S. HRG. 99-1062, PT. 1

# OVERSIGHT OF IRS AND JUSTICE DEPARTMENT PROSECUTION OF SEVERAL TAX CASES

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## HEARINGS

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF THE
INTERNAL REVENUE SERVICE

OF THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

JUNE 19, 20, AND 23, 1986

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# OVERSIGHT OF IRS AND JUSTICE DEPARTMENT PROSECUTION OF SEVERAL TAX CASES

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THURSDAY, JUNE 19, 1986

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT
OF THE INTERNAL REVENUE SERVICE,
COMMITTEE ON FINANCE,
*Washington, DC.*

The subcommittee met, pursuant to notice, at 10:05 a.m., in room SD–215, Dirksen Senate Office Building, Hon. Charles E. Grassley presiding.

Present: Senators Grassley and Armstrong.

[The press release announcing the hearing and the opening statement of Senator Armstrong follow:]

[Press Release No. 86–048]

**FINANCE SUBCOMMITTEE SETS HEARING ON OVERSIGHT OF INTERNAL REVENUE AND DEPARTMENT OF JUSTICE ACTIVITIES IN THE CRIMINAL PROSECUTION OF SEVERAL TAX CASES**

Senator Packwood (R.-Ore.), chairman of the Senate Committee on Finance, announced today that the Subcommittee on Oversight of the Internal Revenue Service will hold hearings the mornings of June 19, 20, and 23, on possible improper activities by the Internal Revenue Service and the Justice Department in the prosecution of several tax cases. The hearings will be chaired by Senator Charles E. Grassley (R.-Iowa) and Senator William L. Armstrong (R.-Colo.).

Of particular interest to the subcommittee will be testimony relating to two recent Federal District Court decisions, *United States* v. *Kilpatrick* (D. Colo. 1984), and *United States* v. *Omni International Corporation* (D. Md. 1986), where the courts dismissed the indictments because of IRS and/or Justice Department abuses committed either before the grand jury or the District Court in opposition to motions to dismiss the indictments.

The subcommittee will also review the activities of the IRS and the Justice Department in the investigation and prosecution of cases involving abusive tax shelters and/or foreign investments.

Finally, the Subcommittee will review the Justice Department's attempt to keep a Federal District Court opinion, which was critical of the Department's handling of the Kilpatrick case, from being published in the Federal Court reports.

## STATEMENT OF
## SENATOR WILLIAM L. ARMSTRONG
## SENATE FINANCE COMMITTEE
## SUBCOMMITTEE ON OVERSIGHT OF THE INTERNAL REVENUE SERVICE
## HEARINGS JUNE 19, 20, and 23, 1986

Good morning and welcome to this, the first of several, hearings of the Senate Finance Subcommittee on Oversight of the Internal Revenue Service. I would like to thank both Senator Dole, Chairman of this subcommittee, for allowing us to hold these oversight hearings and Senator Grassley for graciously agreeing to chair them. The purpose of these hearings is to look into concerns that the Finance Committee has about reported misconduct by the Government or employees of the Government in the collection of taxes and in the investigation and prosecution of individuals for tax evasion.

The first set of hearings...today, tomorrow and Monday...will focus on three recent Federal District Court decisions which ruled that the Internal Revenue Service and the Justice Department committed serious abuses in the prosecution and investigation of tax cases. I am speaking of *United States v. Kilpatrick*[1] and *United States v. OMNI International Corporation*[2], and I cannot overemphasize the seriousness of the Federal District Courts' conclusions and findings of fact.

Later, other oversight hearings will be scheduled to look into alleged abusive actions by the IRS in the collection of taxes, with a focus on law suits brought by taxpayers, *Seibert v. United States*[3] and *Rutherford v. United States*.[4] The subcommittee will also be looking into alleged problems of IRS tampering with mail in the investigation of tax cases, with a focus on the *United States v. Brown*[5] case, where an IRS agent was convicted of lying to a grand jury about how he came into possession of key pieces of the defendant's mail...which were apparently stolen for him by the defendant's neighbor.

The hearings today, tomorrow, and Monday will focus on Federal prosecution of the Kilpatrick and OMNI International cases. In both cases, the indictments brought by the Government against the defendants were dismissed by the Federal District Courts for misconduct by the Government in the prosecution of the cases. Moreover, in the Kilpatrick case, the Federal District Court dismissed all tax related indictments prior to trial for failure to state a crime.

## U.S. v. Kilpatrick

My interest and concern about this case and similar reported incidents began several years ago. I first became aware of possible problems when Bill Kilpatrick called me during the prosecution of his case and told me what was happening to him. The matter was in litigation, and, as I told him, there was little I could do at that point...moreover, I have to admit that at the time I was rather skeptical that our Government could be "doing the sort of things" Mr. Kilpatrick was telling me. Shortly after his call, however, Bill Kilpatrick's concerns were corroborated and set down in detail by the Federal District Court itself. On August 25, 1983, Federal District Court Judge Fred M. Winner wrote a comprehensive, hard-hitting opinion, that was extremely critical of three Department of Justice attorneys who litigated the case and IRS agents who presented the case to the grand jury. At the time, Judge Winner summarized his view of the case (reported in a January 27, 1984 Denver Post article) as, "an ill-starred case which had its first questionable conduct during the opening two minutes of grand jury investigation and which had conduct suspect under the Canons of Professional Responsibility lasting into post-trial hearings." Judge Winner, who has since retired from the Court and is now in private practice, is here today at my invitation to explain his findings to the Committee, so I will leave the details of his decision for his testimony.

The mere fact of this decision was enough to raise serious concern over the conduct of the Government in this case, but it was then seriously aggravated when the Justice Department attempted to prevent publication of Judge Winner's decision in the West Publishing Company's Federal Supplement reports, a hard-bound compilation of federal court decisions. The Justice Department petitioned the 10th Circuit Court of Appeals to block publication of the decision, which the then head of the Justice Department's tax division, Glenn L. Archer, Jr., defended in an interview with the New Yorks Times as necessary because the "slanderous" judicial opinion unfairly criticized three of his prosecutors.

This attempt understandably caused quite a stir, and the Justice Department was strongly criticized in the media. A January 27, 1984, Denver Post article labeled the move a "gag order" and pointed out that an attorney opposing the Department's move had commented that:

> When the indictment came down in 1982 against Kilpatrick and other defendants, the Department of Justice issued a four page press release without worrying about the reputations of the accused before they had their day in court. Now, suddenly, they are extremely worried about the reputations of their attorneys...claiming they have not had their day in court.

The Wall Street Journal on January 25, 1984, editorialized with the following remarks:

> We sympathize with the Justice Department's wish to protect the reputations of its lawyers against accusations involving truly obnoxious prosecutorial practice. It is awful to be dragged publicly and unjustly through this kind of mud. In fact, this may be the time

> to remind these energetic prosecutors that public mudslinging before all the facts are in is just as awful for a private citizen whom the department has just visited with an indictment and a press release.
>
> Judges should be very careful when leaning on prosecutors this way with the full weight of judicial authority. Prosecutors should be just as careful when leaning on the rest of us.

On my part, I publicly protested this move by the Department to censor the opinion and placed a statement in the Congressional Record on January 27, 1984, which I would like included in the hearing record today. There are several articles and accounts of this issue following that statement that will give my colleagues on the Committee a sense of the scope of the issue and public outcry.

Despite the initial efforts of the Justice Department and the continued efforts of the three prosecution attorneys to bar publication of the decision, Judge Winner's decision was eventually published. The Justice Department subsequently has issued a public apology for attempting to keep the decision from being published. A copy of the decision will be placed in the hearing record by our first, and only, witness today, Judge Fred Winner.

Now, on to the substance of this particular case. To understand the legal mechanics of this case, the following outlines the chronology of events, as I understand them:

> The IRS initiated an investigation of Bill Kilpatrick and other business associates into the legality of his "capital formation business." A business described by Bill Kilpatrick, which put large businesses together for the benefit of about 1700 small investor units from all over the U.S. The IRS was investigating the business to see if it was creating illegal and abusive tax shelters to evade taxes.
>
> In 1982, after two consecutive grand juries taking almost two years, a 27 count indictment was brought against 7 people (including Bill Kilpatrick) and the Bank of Nova Scotia, for conspiracy, mail fraud, and obstruction of justice in connection with his business.
>
> Mr. Kilpatrick and his attorneys countered that his business was not illegal, and that he had taken special precautions to get advance tax

opinions from major law and accounting firms, prior to any investment sale, to assure the program's compliance with the law.

On February 21, 1983, prior to trial, Federal District Court Judge John Kane dismissed all tax related indictment counts for failure to charge a crime (26 of the 27 counts brought by the Government against the defendants). This left one, non-tax related charge of obstruction of justice against Bill Kilpatrick. The Government appealed the Court's decision to the United States Tenth Circuit Court of Appeals (appeal still pending) and proceeded to prosecute Bill Kilpatrick on the one remaining count before the Federal District Court.

The remaining obstruction of justice count was prosecuted by three attorneys from the Washington, D.C., Tax Division of the Justice Department. As Judge Winner observed in his decision, "The single remaining count of the indictment had absolutely nothing to do with tax law, and the trial could have been handled competently and with aplomb by any assistant United States Attorney living in Denver, but the administrative decision of the Department of Justice was to send three lawyers from the Tax Division to try an obstruction of justice case, a prosecution unrelated to their professed area of expertise."

In the Spring of 1983, Bill Kilpatrick was convicted of the charge of obstruction of justice.

On August 8, 1983, the Tenth Circuit Court of Appeals remanded part of the case on appeal back to the Federal District Court to look into prosecutorial misconduct which might be sufficient to dismiss the indictment.

On August 25, 1983, on post-trial motions after conviction of the one count of obstruction of justice, Federal District Court Judge Fred Winner granted Bill Kilpatrick a retrial based on a litany of possible Government misconduct in the investigation and prosecution of the case.

The case was not retried, because the Federal District Court, on remand from the Tenth Circuit, dismissed the conviction on September 24, 1984, "because of totality of circumstances, which included numerous violations of federal criminal rules pertaining to grand juries, violations of statutory witness immunity sections, violations of the Fifth and Sixth Amendments (of the Constitution), knowing presentation of misinformation to grand jury and the mistreatment of witnesses."

In summing up the abuses found to have occurred in the case, Federal District Court Judge Kane observed:

> From the inception of the twenty-month grand jury investigation when the prosecutors divined the office of "agent of the grand jury" on the IRS agents through the time of the agent's improper "summaries" presented shortly before the indictment was returned, the conduct of the Department of Justice attorneys substantially undermined the ability of the grand jury to exercise independence. The numerous abuses and violations of rules and constitutional principles must be considered particularly serious

> because of the admissions in these hearings, that, for the most part, the activity was undertaken knowingly and purposefully.
>
> ...In sum, the substantial departures of prosecutors in this case from established notions of fairness, from clearly articulated rules of procedure and, indeed from the Department of Justice's own manual and operating directives constitute systematic and pervasive overreaching.
>
> ...What is perhaps most alarming is that even the very last of so many hearings, one of the prosecuting attorneys continued to refer to the challenge to his and his colleagues' conduct as "silly" and "frivolous."...The supervisory authority of the court must be used in circumstances such as those presented in this case to declare with unmistakable intention that such conduct is neither "silly" nor "frivolous" and that it will not be tolerated. (Emphasis added).

The decision is now on appeal to the United States Court of Appeals for the Tenth Circuit. Oral argument was made to the Court late last summer and a decision is expected in the near future.

At this point, I will not go into further detail about the particular findings of the second District Court decision in this case. Federal District Court Judge Winner, in addition to outlining the reasoning of his decision, will outline the details of Judge Kane's decision, which dismissed the remaining indictment and conviction against Bill Kilpatrick.

Suffice it to say, however, that this case attracted a great deal of attention and raised such serious concerns that even CBS's 60 Minutes did a story on it last year. I ask that the transcript of that show be placed in today's hearing record.

Because of the press and general public concern raised about the Kilpatrick case, my office over the last two years has received numerous and varied complaints about the IRS. Some of the reactions and complaints were not unexpected...tax collectors from time immemorial have been very unpopular folks. However, several of the concerns raised are very disturbing and are the focus of today's hearings and will be the focus of later hearings by this subcommittee.

## U.S. v. Omni International Corporation

Because of the Kilpatrick case, I also have been following other cases that might be similar. Another such case that drew my attention was the Government's prosecution of the Omni International Corporation. I first noticed the case because of an April 27, 1985 Washington Post article, which reported that Omni's attorneys had filed a motion to dismiss the case charging, among other things, that the assistant United States attorney and two IRS agents had altered documents in the case and had not told the defendants or the court about the changes. In looking into the case, I was also told at the time that 5 years earlier a federal district court had dismissed another criminal case because the same assistant U.S. attorney had apparently withheld a key document from the defense. On May 28, 1985, another Washington Post article reported on the progress of the case, noting that:

> At an evidentiary hearing last summer before U.S. District Court Judge Walter E. Black Jr., a documents expert and other witnesses contradicted claims of IRS agents that several of the memos were written in 1983, prior to Omni's motion to dismiss. In fact, according to the testimony, the memos were prepared in the spring of 1984, most of them after Omni's motion to dismiss was filed on April 27, 1984.

After a year's deliberation, the Federal District Court for Maryland granted the defendants' motion and dismissed the indictment. Although I intend to go into greater detail about this case later, I will give you a brief summary now of how it evolved and the District Court's reaction.

On March 13, 1984, a grand jury returned a seven-count indictment against Omni International Corporation and four individuals. The defendants were charged with conspiracy to defraud the IRS, conspiracy to commit income tax evasion, and tax evasion for the years 1976-1980. The prosecution contended that the defendant(s)--a Rockville, Maryland, company which buys, sells and leases aircraft world-wide--was evading taxes by falsely reporting income in the name of an untaxed, wholly owned Bermuda subsidiary, Euro Airfinance Ltd., when in fact the income allegedly should have been reported as belonging to the parent company, Omni. The defendants countered that the IRS code provides that under certain circumstances income earned by a controlled foreign corporation is not immediately taxable as U.S. income, but is taxed only when it is brought into the country. Defendants also contended that all of the income earned by Euro Air was reported on information returns filed with the IRS. The Court, however, never got to the merits of the case. On April 27, 1984, the Omni defendants filed a motion to dismiss the indictment, disqualify government counsel and investigators, and suppress evidence based on violations of the attorney-client privilege. A 28 day hearing was held on this motion in the summer of 1984. Until recently, the Court had the motion under advisement. On May 15, 1986, however, in a 64 page opinion, the Court meticulously reported violation after violation that occurred by the prosecution in the Government's defense against the defendants' allegations. Based on these abuses, the Court dismissed the indictments.

The Court expressed "grave concern" over four aspects of the case. The first was over the creation and alteration of at least 10 documents by the assistant U.S. Attorney and two IRS agents, which were given to the defendents and the Court in preparation for the June hearing on the motion to dismiss the indictment...without any explanation of the alteration.

The second area of concern involved the "repeated untrue and incorrect testimony which occurred during the course of the proceedings," which the Court said, by its sheer magnitude, "prejudiced the defendants and the

Court." Third, the Court emphasized an aspect of the Government's investigation that it found particularly startling, which the following passage from the opinion explains:

> Perhaps the most flagrant, troubling aspect of the entire tax investigation occurred when the Government interviewed Sandra Poe Wilkins, Bornstein's secretary. [Bornstein is an attorney for Omni and also a codefendant.] The Government contends that there is no impediment, legal, technical, ethical, or otherwise, to an unannounced, uncounselled, surprise interview of a lawyer's secretary when the focus of the interview will be on what the secretary knows about the relationship between the lawyer and his client. Unlike lawyers, who can protect the attorney-client privilege, secretaries have no legal training and cannot be expected to make sophisticated judgments regarding the scope of the privilege. This Court is shocked and offended by such a procedure and condemns this investigatory tactic, especially in the factual situation presented here. [Emphasis added].

The fourth area of concern raised by the Court was what it labeled the Government's pervasive "lack of candor." The Court elaborated:

> It is clear beyond any doubt that misrepresentations were made to the Court, from the beginning of the evidentiary hearing. ...and there was virtually a wholesale failure of recall of critical events by the relevant Government witnesses, and no such failure by the defendants' witnesses. At the least this failure constitutes a lack of candor. The primary (but not sole offender is the AUSA (assistant U.S. Attorney).

The Court concluded with the finding that: "The Government's conduct was patently egregious and cannot be tolerated or condoned. Its manner of proceeding shocks the Court's conscience. The indictment must be dismissed as a prophylactic sanction for the consistent course of entrenched and flagrant misconduct...." It is of particular note, also that Federal District Court Judge Black is a former United States Attorney and obviously very familiar with proper procedures from his personal experience.

I ask that a copy of the Court's opinion be placed in the hearing record.

## CONCLUSION

Federal District Court decisions like these cannot be taken lightly. They raise serious concerns about the Government's prosecution of at least these two cases...and perhaps others. They raise questions about both how and why the Government prosecutes them. Moreover, they raise questions as to what the Justice Department and IRS does with regard to those persons found by a Court to have carried out such misconduct. It is my understanding that to date no action by either the Justice Department or the IRS has been taken against any of the parties in question in the prosecution of either the Kilpatrick or Omni cases...not even to the point of placing the individuals on administrative leave until the matter is resolved.

No one on the Finance Committee, and I dare say the Congress, condones tax evasion or abusive tax shelters. Moreover, it is my understanding of the process and the laws available to the IRS, that the IRS has extensive civil power to collect taxes from taxpayers not paying their fair share. It is my understanding of these two cases, however, that the IRS never attempted to collect taxes allegedly evaded, through the civil processes available to them before prosecuting the defendants in these two cases.

The fact that the Court, at least in the Kilpatrick case, dismissed the tax related indictments prior to trial for failure to state an offense, magnifies our concern. I am not defending the business dealings Bill Kilpatrick and his business associates had established and were promoting. In fact, I know next to nothing about it. The mere fact that the Court so readily dismissed the indictments, however, raises serious concerns in my mind as to the decision of the Government to prosecute in the first place.

The purpose of today's hearings are to focus on several questions raised by these two cases. The subcommittee and I am interested in learning more about them and are very interested in the Government's view of them, including how they are responding to them, and what safeguards, if any, are being instituted to avoid similar happenings.

The issues we are reviewing today turn on the preliminary stages of prosecution of a criminal case and primarily around the investigation process, including activities before the grand jury.

In recent years, the grand jury process has undergone serious criticism and major reforms. Because of its prominent role in the hearings today, I thought that a historical perspective of the process would be of interest to the subcommittee. The following passage from a case note in from the Ohio State Law Journal, Volume 45, page 1077-1078, explains the origins of the grand jury as an institution (footnotes have been omitted):

> The grand jury was established in England in 1166 during the reign of Henry II. The [original] purpose of the grand jury was to consolidate the royal power by enabling the centralized government to have additional control over the administration of justice throughout the kingdom.... The grand jury was not intended to protect citizens from arbitrary prosecution; instead, the grand jury was intended to be subservient to the King, to enforce his dealings with the state, and to encourage citizens to provide the government with information pertaining to crimes.
>
> In 1681, King Charles II sought to convict the Earl of Shaftesbury and Stephen Colledge for treason. Both men were determined Protestant opponents of the King's attempt to reestablish the Catholic Church in England. The grand jury rebuffed the King's efforts to influence the proceedings and eventually refused to issue an indictment. This assertion of power by the grand jury has been hailed as the initial manifestation of its "role as a shield for the innocent against malicious and oppressive prosecution." English settlers brought the grand jury concept to the New World and established the grand jury as an institution to (1) present malefactors (criminals) for criminal prosecution and (2) protect citizens from arbitrary prosecution. The framers of the United States Constitution later incorporated the right to a grand jury in the fifth amendment (to the Constition) for essentially the same reasons: "The Grand Jury is both a sword and shield of Justice--a sword because it is the terror of criminals, a shield because it is the protection of the innocent against unjust prosecution.

The prosecutors role, whether before the grand jury or in the subsequent prosecution of a case, has been long established and is well described in a passage from a Supreme Court decision, Berger v. United States, 295 U.S. 78, 88 (1935). Although the following quote applies to the role of United States Attorneys, it is equally applicable to any Federal prosecutor:

> The United States Attorney is the representative not of an ordinary party to a controversy, but a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

The success of our modern tax system has depended upon the voluntary compliance of the ordinary American citizen with the Nation's tax laws. This self-assessment, where the taxpayer tells the government how much he owes, is essential. Actions that might destroy the confidence of the taxpayer in the fairness of the tax system and the way it is administered must be avoided.

Today's tax laws are extremely complicated...we hope that we will simplify some of that by the Senate's tax bill now under consideration in Congress. Nevertheless, our tax laws will never be simple. They will always be as complicated as the business that is carried on by the citizens of this Country. The import of this is stated well in the following forward to a 1960 Tax symposium:[6]

> As tax burdens have increased, tax administration has become increasingly important. With low tax rates, ineptitude or discriminatory treatment may not do too much harm, but with high rates any serious inadequacies destroy tax payer morale and public acceptance of even the most theoretically perfect tax program. *Indeed, as the administrative tasks become larger and more difficult, excellence in performance becomes even more important*. (Emphasis added).

It now gives me great pleasure to welcome to the subcommittee, retired Federal District Court Fred M. Winner, currently in private practice in the Denver, Colorado, law firm of Baker & Hostetler. Judge Winner distinguished himself as a Federal District Court Judge for Colorado for twelve years. Born in Colorado, Judge Winner went to law school at the University of Colorado and was appointed to the Federal District Court bench by President Nixon on December 18, 1970. We welcome you Judge Winner, and I am very glad that you agreed to accept my invitation to appear before this subcommittee on this matter.

1. United States v. Kilpatrick, 575 F. Supp. 325 (D. Colorado 1983) and 594 F. Supp. 1324 (D. Colorado 1984), pending appeal before the 10th Circuit, oral argument was heard August 1985.
2. United States v. OMNI International Corporation, Criminal No. B-84-00101 (D. Maryland, May 15, 1986).
3. Seibert v. United States, unpublished District Court Decision, 594 F.2d 423 (5th Circuit 1979) and 599 F.2d 743 (5th Cir. 1979), cert. denied by Supreme Court.
4. Rutherford v. United States, 528 F. Supp. 167 (D. Texas 1981), reversed 702 F2d 580 (5th Cir. 1983).
5. United States v. Brown, Crim. No. 83-CR-72 (D. Northern N.Y.), also discussed in both a February 6, 1985 and a January 28, 1986 newspaper article in the Post Standard, Syracuse, N.Y.
6. "Management's Stake in Tax Administration," Tax Institute Symposium on September 1960. Forward by Dan Troop Smith, Harvard Graduate School of Business Administration (March 1961).

Senator GRASSLEY. I would like to call this Subcommittee on Oversight of the Internal Revenue Service to order. Today, this subcommittee begins a series of oversight hearings.

We will be examining the functioning of the Internal Revenue Service and also the Justice Department in upholding their duty to properly enforce the laws of the United States in connection with the prosecution of alleged Tax Code violations. There is no question that this is a difficult duty to carry out; and because of this difficulty, transgressions can unfortunately take place and we feel have.

We are here today to review some of these possible transgressions. We are conducting these oversight hearings in order to fulfill a congressional responsibility, and that is specifically to be a constitutional check and balance on the executive branch and its respective agencies. Now, it is not our intent to cast aspersions on any particular person or institution, but hopefully to prevent any potential future violations.

At this time, we will turn our attention specifically for this meeting to the facts and circumstances surrounding the case of the *United States* v. *Kilpatrick* and, to a lesser extent, the *United States* v. *Omni International Corp.* In the *Kilpatrick* case, the defendants were indicted on multiple counts of conspiracy, mail fraud, tax fraud, and defendant William Kilpatrick was individually charged with obstruction of justice. Now, all of the counts were dismissed for failure to state a crime with the exception of the obstruction of justice count against William Kilpatrick.

However, this count was also ultimately dismissed by District Judge Kane, and that was due to what he termed the totality of circumstances involving numerous violations of the Federal Rules of Criminal Procedure, violations of the fifth and sixth amendments, and the Government's knowing presentation of misinformation to the grand jury and the mistreatment of witnesses.

Two judges that have presided over this case at different levels have indicated in their published opinions that some rather bizarre activity took place in the prosecution of this case.

Our witnesses today—or I should say our one witness today—Judge Fred Winner, who presided over the posttrial motions hearings in the *Kilpatrick* case, is with us to provide an inside view and an objective understanding of a case where justice seems to have gone astray. Judge Winner will set the stage today for this unusual drama, and he will do that by providing legal and judicial expertise regarding the prosecution of taxpayers' cases.

Tomorrow, defendants Kilpatrick as well as others involved in his side of the case will present their testimony.

And then following, on Monday, June 23, the Justice Department and the Internal Revenue Service will provide testimony on their part of the prosecution.

Again, I would like to state that, for the purposes of these hearings, it is not to criticize particular persons or institutions, but to examine problems within the system as well as how that system is or is not rectifying itself.

We are not examining and we are not questioning the guilt or the innocence of the defendant taxpayers involved in these cases. We are merely concerned with the proper enforcement of the law and our goal is to make sure the system is on the right track and to prevent any potential future taxpayer abuses by the Government.

I want to now turn to Senator Armstrong for his opening statement before I introduce our witness.

Senator **Armstrong**. Mr. Chairman, thank you. I am grateful to you for doing so, and I appreciate your taking the time to participate in this, not only this morning but over the last several months—more than a year—in which you have expressed interest in this matter and have consulted with me and members of my staff in preparing the groundwork for the series of hearings which we begin here this morning.

I also want to thank Senator Dole who has been consulted about this. He wears many hats here in the Senate; one of them is chairman of the Senate Finance Subcommittee on Oversight of the Internal Revenue Service. It is with his backing and approval that we undertake this task.

The purpose of these hearings is to look into the concerns which have repeatedly surfaced in the press during the last couple of years, which have come to my attention in some other ways which I will mention, about reported misconduct by the Government or employees of the Government in the collection of taxes and in the investigation and prosecution of individuals on charges of tax evasion.

The first set of hearings—that is, this morning, tomorrow, and on Monday—will focus on three Federal district court decisions which held that the Internal Revenue Service and the Justice Department committed serious abuses in the prosecution and investigation of tax cases. I refer to the cases of the *United States* v. *Kilpatrick* and the *United States* v. *Omni International Corp.* I want to just start by saying that, in my opinion, it would be almost impossible to exaggerate the significance of what these courts have held.

The reason I say that is this: When this first began to surface as a public issue and reported widely in the print press and also on the television program "60 Minutes," I began to get telephone calls from people all over the country, alleging one kind of prosecutorial abuse or misconduct or another. And a lot of them, frankly, were in the classification of the "income tax is unconstitutional," and so on, the kind of thing which, honestly, I could not treat very seriously. And it was my decision, on the advice of counsel, that we would focus not on what somebody whispered or on some allegation that was slipped under the door at midnight, but on the actual findings of the court—what was on the public record—which eliminates the need for this subcommittee to try to go back and have any findings of fact to determine whether or not there was any misconduct.

That has already been determined. We are going to air it simply to get it on the record of this subcommittee; but we are not finding fact here; that has already been done on a number of occasions by properly constituted courts.

Later, other oversight hearings will be scheduled to look into alleged abusive actions by the IRS in collection of taxes and focus on lawsuits brought by taxpayers, specifically *Seibert* v. *United States* and *Rutherford* v. *United States;* and the subcommittee will also be looking into alleged problems of IRS tampering with the mail in the investigation of tax cases, with the focus on the case of the *United States* v. *Brown* in which an IRS agent was found to have lied to a Grand Jury about how he came into possession of key pieces of the defendant's mail, which were evidently stolen for him by the defendant's neighbor.

The hearings today, tomorrow, and Monday focus on Federal prosecution in the *Kilpatrick* and *Omni* cases; and in each of these cases, indictments brought by the Federal Government against the defendant were dismissed by the Federal district courts for misconduct by the Government in the prosecution of these cases. Moreover, in the *Kilpatrick* case, the Federal district court dismissed all tax-related indictments prior to trial for failure to state a crime.

This brings me, Mr. Chairman, to how I got in on this; and it is hard to imagine a less likely subject for this Senator from Colorado to have been involved in because I am not an attorney. I don't want to be an attorney. I don't want to play cops and robbers. I am not particulary fond of oversight hearings, which I think often are mumbo-jumbo. But the way this came to my attention is when a constituent, Mr. Bill Kilpatrick, called me up and he said: Look, I am about to be indicted for something which isn't even a crime; and besides, it is unjust; it is all an attempt to embarrass me and perhaps to ruin my business.

Frankly, Mr. Chairman, I did not take that all very seriously because I assume that whenever anybody is about to be indicted, they have a lot of excuses and a lot of reasons why I didn't do it or it isn't a crime or the world isn't fair, the prosecutors are misbehaving, or something or another.

Mr. Kilpatrick, however, was so insistent and began to argue so persuasively that I began to wonder if maybe this wasn't one of those rare cases where in fact there was an element of misconduct or abuse or if something was going off the rails. I was impressed when he submitted a legal brief by one of the most distinguished law firms in Colorado which supported his contention that, in fact, what he was charged with doing did not constitute a crime.

If I may just depart for a moment from my prepared remarks which I will insert in the record, with the approval of the Chair, I was distressed by the possibility that there might be people who were actually convicted, even serving time in the penitentiary, for the offenses mentioned in the indictments which Mr. Kilpatrick said would be forthcoming and which in fact were subsequently forthcoming, if they didn't really constitute a crime, which was the nub of his argument.

Well, it did seem pretty farfetched; and yet, as I got more and more deeply involved in it, I consulted with the U.S. attorney from Colorado and with others and asked this question: What can I do about this? And what is the proper role for a U.S. Senator to play at this stage of an investigation of this type? And what I was told is: There really isn't anything that you can do. There isn't any proper course of action that you can take to intervene in this in any official way.

And I said: Well, if that is the case, if that is the situation, what happens if what Mr. Kilpatrick says turns out to be true? Suppose this is a vendetta? Suppose there is prosecutorial abuse? Suppose, in fact, this is all just an activity—an improper activity—by Government employees and lawyers to get him, to discredit his business, to put him out of business because of publicity which results. I was told if that happens, then he can sue them afterwards.

Mr. Chairman, it turns out that that is not exactly true; and in fact, when we get to the end of this process, it may be that we will want to consider some legislation to give wronged persons greater access to the courts for the purpose of recovering monetary damages or for other reasons.

But in any case, that is how I got into this. It turned out that, in broad outline, if not in specific detail, the courts affirmed what Mr. Kilpatrick was so insistently trying to tell me before he was indicted, that is, that the offenses of which he was about to be accused and about to be indicted did not constitute a crime.

Shortly after all this happened, in fact, the Federal district court handed down its opinion—a hard-hitting and very interesting opinion which I commend to our colleagues—that was extremely critical of three Justice Department attorneys who litigated the case and the IRS agents who presented the case to the grand jury.

Now, let me just make one other observation, Mr. Chairman. I want to echo what you have said. I am not here to inquire into the guilt or innocence of Mr. Kilpatrick or anybody else, and I am not here to endorse or condemn the business practices which led to his being prosecuted. That is for somebody else to be concerned about. It is not my interest in this case; and in fact, Mr. Kilpatrick has shown for one thing that he has the capacity to defend himself very ably, albeit at great cost. I think he may want to say something about that when it comes his time to appear before the committee.

My interest is the prosecutorial abuses. Has there been misconduct? It is pretty clear that there has been because it has shown up repeatedly in the opinions of the courts. And what has been the response of the Department of Justice and the IRS? What safeguards have they undertaken to assure that such a pattern of conduct—the prejudice of the rights of citizens and taxpayers—are not continued? At the time he handed down his opinion, Judge Fred Winner referred to the prosecution of the case as "an ill-starred case" which had its first questionable conduct during the opening 2 minutes of grand jury investigation and which had conduct suspect under the canons of professional responsibility lasting into posttrial hearings.

Judge Winner, who will be with us here this morning at my invitation, will explain his findings; and so, I am not going to go into the details of what I expect that he will share with the committee. The fact of his opinion—his decision—was enough to raise a very serious concern in my mind and in the minds of other thoughtful observers of this case.

But what happened next seemed to me to be downright bizarre because the Justice Department petitioned the Tenth Circuit Court of Appeals to block publication of Judge Winner's decision on grounds which the, then, head of the Justice Department's Tax Division, Glen L. Archer, Jr., defended in a New York Times interview as necessary because the "slanderous judicial opinion," unfairly criticized three of his prosecutors. You can imagine that this stirred up quite a bit of controversy.

And my response—which turned out in the long run, not to be deposed of the issue—but my response was that, by gosh, this opinion was going to be published somewhere because I had a copy of it, and I inserted it into the Congressional Record. In due course, the Justice Department's request that regular publication of it be suppressed was turned down.

But the Wall Street Journal on the 25th of January 1984 summed up, I think, what a lot of us were feeling in these words:

> We sympathize with the Justice Department's wish to protect the reputations of its lawyers against accusations involving truly obnoxious prosecutorial practice. It is awful to be dragged publicly and unjustly through this kind of mud. In fact, this may be the time to remind these energetic prosecutors that the public mud-slinging before all the facts are in is just as awful for a private citizen whom the Department has just visited with an indictment and a press release. Judges should be very careful when leaning on prosecutors this way with the full weight of judicial authority. Prosecutors should be just as careful in leaning on the rest of us.

Well, the long and the short of it, Mr. Chairman, is that the opinion was published and, of course, has been studied widely. One of the places where this came to attention was a nationwide television program, and it appeared there. That is when we began to hear from other citizens and from other lawyers reporting similar abuses. And that is when I began to wonder whether or not what had come to our attention in the *Kilpatrick* case was an isolated example or whether or not, in fact, part of a pattern of misconduct. And that is the essence of what this hearing is all about.

Mr. Chairman, now just to get us in the right perspective and to get us properly started, I would like to just outline the chronology of the facts in the *Kilpatrick* case as I understand it.

The IRS initiated an investigation of Bill Kilpatrick and other business associates into the legality of his capital formation business, a business described by Kilpatrick which put large businesses together for the benefit of about 1,700 small investor units throughout the country. The IRS was investigating the business to see if it was creating illegal and abusive tax shelters to evade taxes.

In 1982, after two consecutive grand juries taking almost 2 years, a 27-count indictment was brought against seven people, including Mr. Kilpatrick and the Bank of Nova Scotia. Mr. Kilpatrick and his attorneys countered that the business was not illegal and that he had taken special precautions to get advanced tax opinions from major law and accounting firms prior to any investment sales to assure the program's compliance with the law.

On February 21, 1983, prior to trial, Federal District Judge John Kane dismissed all tax-related indictment counts for failure to charge a crime—precisely what Mr. Kilpatrick told me was likely to happen before he was even indicted. This left one nontax related charge of obstruction of justice against Mr. Kilpatrick.

The Government appealed the court's decision to the United States Tenth Circuit Court of Appeals and proceeded to prosecute Kilpatrick on the one remaining count before the Federal district court. The obstruction of justice count was prosecuted by three attorneys from Washington, DC, the Tax Division of the Justice Department.

As Judge Winner observed in his decision, I now quote:

> The single remaining count of the indictment had absolutely nothing to do with tax law. The trial could have been competently handled and with aplomb by any assistant U.S. attorney living in Denver, but the administrative decision of the Department of Justice was to send three lawyers from the Tax Division to try an obstruction of justice case, a prosecution unrelated to their professed area of expertise.

In the spring of 1983, Mr. Kilpatrick was convicted of the charge of obstruction of justice. On August 8, 1983, the Tenth Circuit Court of Appeals remanded part of the case on appeal back to the Federal district court to look into prosecutorial misconduct which might be sufficient to dismiss the indictment. On August 25th of that year, on posttrial motions after conviction of the one count of obstruction of justice, Judge Winner granted Mr. Kilpatrick a retrial based upon a littany of possible Government misconduct in the investigation and prosecution of the case.

The case was not retried because the district court, on remand from the tenth circuit, dismissed the conviction on September 24, 1984—

> Because of totality of circumstances which included numerous violations of Federal criminal rules pertaining to grand juries, violations of statutory witnesses immunity section, violations of the fifth and sixth amendments, knowing presentation and misinformation to the grand jury, and mistreatment of witnesses.

In summing up the abuses found to have occurred in the case, Judge Kane observed—I now again quote:

> From the inception of the 20-month grand jury investigation when the prosecutors divined the office of agent of the grand jury on the IRS agents through the time of the agents' improper summaries presented shortly before the indictment was returned, the conduct of the Department of Justice attorneys substantially undermined the ability of the Grand Jury to exercise independence. Numerous abuses and violations of rules and constitutional principles must be considered particularly serious because of the admissions in these hearings that, for the most part, the activity was undertaken knowing and purposefully. In sum,

and I am continuing to quote,

> * * * the substantial departures of prosecutors in this case from established notions of fairness, from clearly articulated rules of procedure, and indeed from the Department of Justice's own manual and operating directives, constitute systematic and pervasive overreaching. What is perhaps most alarming is that even the very last of so many hearings, one of the prosecuting attorneys continued to refer to the challenge to his and his colleagues' conduct as "silly" and "frivolous." The supervisory authority of the court must be used in circumstances such as these presented in this case to declare with unmistakable intention that such conduct is neither "silly" or "frivolous" and that it will not be tolerated.

Mr. Chairman, I won't quote further from that opinion; but I do want to observe that that is my view, too, and I am confident that the view expressed by the court that such conduct is neither "frivolous nor silly" and "will not be tolerated" is, I am sure, the view of members of this subcommittee and of the Senate.

I am not going to go into further detail about this particular case because Judge Winner is here; and in addition to outlining the reasoning of his decision, I believe he is prepared to discuss Judge Kane's decision as well. But I do think it is important to understand that what we are talking about is not Mr. Kilpatrick. It is the question of the abuse of the grand jury process.

Now, Mr. Chairman, with apologies for taking a bit longer than I would ordinarily wish to take in an opening statement, I now want to turn briefly to the *United States* v. *Omni* case, another case I have been following, as a result of the Kilpatrick——

Senator **GRASSLEY**. Let me interrupt just a minute.

Senator **ARMSTRONG**. Yes; of course.

Senator **GRASSLEY**. I have to explain to you and also to the witness and to the audience that I am going to be in and out during this; and I am going to leave right now to make a quorum at the Judiciary Committee, and then I also have my regulatory reform bill up before Judiciary. So, I will absent myself and be in and out. Would you introduce Judge Winner then?

Senator **ARMSTRONG**. I will, indeed, Mr. Chairman. And I think all concerned will understand the problem. If there is anyone in the room who is not aware of it, the Senate is in session, and it may well be that this hearing will be punctuated by rollcall votes. We were in session until after 1 this morning and about the same the day before.

So, this may be a little disjointed, but Senator Grassley and I and members of our staffs who have been working on this are determined that, even if we have to interrupt and one thing and another, we are going to get all of this on the record and try to draw some proper conclusions and to determine what legislative response, if any, will be needed.

So, we will be right here, Senator, and doing business until you return.

To pick up where I left off, the point that I want to bring into perspective—the *Omni* case—is that Omni's attorney filed a motion to dismiss the case, charging among other things that the assistant U.S. attorney and two IRS agents had altered documents in the case and had not told the defendants or the court about the changes.

Looking into the case, I was told at the time that 5 years earlier the Federal district court had dismissed another criminal case because the same assistant U.S. attorney had apparently withheld a key document from the defense. On May 28, 1985, another Washington Post article appeared which reported the following, and I quote:

> At an evidentiary hearing last summer before U.S. District Court Judge Walter E. Black, Jr. a documents expert and other witnesses contradicted claims of IRS agents that several of the memos were written in 1983, prior to Omni's motion to dismiss. In fact, according to the testimony, the memos were prepared in the spring of 1984, most of them after Omni's motion to dismiss was filed on April 27, 1984. After a year's deliberation, the Federal District Court for Maryland granted the defendant's motion and dismissed the indictment.

Although we are going to be going into this case in greater detail later, I want to just give a brief summary of how it evolved and the district court's reaction because it ties in very closely with the developments in the *Kilpatrick* case.

On March 13, 1984, a grand jury returned a seven-count indictment against Omni International and four individuals. The defendants were charged with conspiracy to defraud the IRS, conspiracy to commit income tax evasion, and tax evasion for the years 1976 through 1980. The prosecution contended that the defendants were evading taxes by falsely reporting income in the name of untaxed, wholly owned Bermuda subsidiaries; and in fact, the income allegedly should have been reported as belonging to the parent company, Omni.

The defendants countered that the IRS Code provides that, under certain circumstances, income earned by a controlled foreign corporation is not immediately taxed as U.S. income but is taxed only when it is brought into the country.

Now, I don't want to spend a lot of time on the merits of the case because that is not the issue before this committee. The issue that is before the committee arises from the following facts. On April 27, 1984 the Omni defendants filed a motion to dismiss the indictment, disqualify Government counsel and investigators, and suppress evidence based upon violations of the attorney-client privilege. A 28-day hearing was held on this motion in the summer of 1984. Until recently the court had the motion under advisement; but on May 15 of this year—a little over a month ago—in a 64-page opinion, the court meticulously reported violation after violation that occurred by the prosecution in the Government's defense against the defendant's allegation; based upon these abuses, the court dismissed the indictments.

And the court expressed grave concerns over four aspects of the case. First, the creation and alteration of at least 10 documents by the assistant U.S. attorney and two IRS agents which were given to the defendants and the court and preparation for the June hearing on the motion to dismiss the indictments. Of secondary concern is what the court described as "repeated untrue and incorrect testimony which occurred during the course of the proceedings," which the court said, by its sheer magnitude, prejudiced the defendants and the court.

Third, the court emphasized an aspect of the Government's investigation that it found particularly startling, which the following passage in the opinion explains, and I now quote:

> Perhaps the most flagrant troubling aspect of the entire tax investigation occurred when the Government interviewed Sandra Poe Wilkins, Bornstein's secretary. Bornstein is an attorney for Omni and also a codefendant. The Government contends that there is no impediment—legal, technical, ethical, or otherwise—to an unannounced, uncounseled, surprise interview of a lawyer's secretary when the focus of the interview will be on what the secretary knows about the relationship between the lawyer and his client.
>
> Unlike lawyers who can protect the attorney-client privilege, secretaries have no legal training and cannot be expected to make sophisticated judgments regarding the scope of the privilege.

One more sentence sums up the reaction of the court:

> This court is shocked and offended by such a procedure and condemns this investigatory tactic, especially in the factual situation presented here.

A fourth area of concern mentioned by the court in its opinion is what is labeled the "Government's pervasive lack of candor. It is clear beyond any doubt," the court elaborated, "that misrepresentations were made to the court from the beginning of the evidentiary hearing and there was virtually a wholesale failure of recall of critical events by relevant Government witnesses and no such failure by the defendant's witnesses. At the least, this failure constitutes a lack of candor. The primary but not the sole offender is the assistant U.S. attorney."

The court concluded by finding that "the Government's conduct was patently egregious and cannot be tolerated or condoned. Its manner of proceeding shocks the court's conscience."

It is of particular note also that the Federal district judge, Mr. Black, is a former U.S. attorney and obviously one who is very familiar with proper procedures from his personal experience. I will place in the record a copy of this opinion so it will be available to those who are following this proceeding.

Decisions such as the two I have discussed in the last few minutes cannot be taken lightly, in my opinion. They raise serious concerns about the Government's prosecution of at least these two cases. If it is only these two cases, then there is an element of injustice to the people directly involved; but what is really before this committee, it seems to me, is first whether or not this is a pattern, whether or not there is a tolerance of this kind of misconduct by Government employees and attorneys, and to what extent if any the rights of citizens and taxpayers are thereby prejudiced.

They raise questions as to how and why the Government prosecutes, questions about what the Justice Department and IRS do with regard to persons found by a court to have been guilty of such misconduct, particularly in the *Omni* case since the attorney who was so severely criticized by the court had been, 5 years earlier, criticized for similar misconduct.

It is my understanding—we will get this, I guess, from the Justice Department on Monday—but it is my understanding that to date no action either by the Justice Department or the IRS has been taken against any of the parties who were involved in the prosecution of either the *Kilpatrick* or *Omni* cases, not even—so far as I am advised—to the point of placing anybody on administrative leave until the matter is resolved.

I want to now come to a close, but I think there is one other aspect of this that I want to make just for the record, and that is the question of the grand jury. That is going to be, I think, the focus of what Judge Winner will be talking about, at least at the outset. That is a central issue, possibly the most important issue in the *Kilpatrick* case.

And I want to just insert in the record at this point a brief discussion from volume 45 of the Ohio State Law Journal which discusses the origins of the grand jury, and its place in our judicial systems. It will be well understood by the attorneys who are participating in this hearing today, but for those who have not thought extensively about this, let me just summarize in this way.

The grand jury began as a device by which King Henry II sought to consolidate his power over the entire realm, literally, for the purpose of enabling the central government to have additional control over the administration of justice throughout the kingdom. But about 500 years later, during the reign of King Charles II, the central government and the King sought to convict the Earl of Shaffsbury and Steven College of treason. The grand jury asserted its independence and refused to return the indictment. Details of this are discussed in the material which I am going to put into the record from the Ohio State Law Journal; but that principle—independence of the grand jury, the integrity of the process, the role of the grand jury, not only in bringing to the bar of justice those persons who are accused of a crime, but also to defend the rights of persons who have business before the grand jury has been evolving ever since and is a central and, in my view, very significant part of our legal system, and a part which is seriously jeopardized by the conduct of Government employees and prosecutors in the *Kilpatrick* case.

The prosecutor's role, whether before the grand jury or in subsequent prosecution of the case, has long been established and is well described in a Supreme Court decision, *Berger* v. *United States,* and I will quote briefly from it.

> The United States Attorney is the representative not of an ordinary party to a controversy, but a sovereignty whose obligation is to govern impartially, is as compelling as its obligation to govern at all, and whose interest therefore in a criminal prosecution is not that it shall win a case but that justice shall be done. As such, he is in a peculiar and very definite sense a servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor; indeed, he should do so, but while he may strike hard blows, he is not at liberty to strike foul ones.
>
> It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

And that, ladies and gentlemen, is exactly the issue which is before us today and in the subsequent hearings in this case. It is pretty clear—at least it is clear to me—that people whose duty was to be fair and impartial and to prosecute vigorously did exactly what the case I have just cited said they were not supposed to do; and that is they have struck some foul blows and that they have done so willfully and knowingly and repeatedly.

What I want to find out, and what I intend to find out before we get done with this, is what the reaction is of those persons who are responsible for management of the IRS and the Department of Justice.

It now gives me great pleasure to welcome to the committee Judge Fred M. Winner, who has served with distinction on the U.S. District Court for Colorado, who has recently retired from the court, and who is engaged in private practice in the Denver, CO law firm of Baker & Hostetler.

Judge, would you join us up at the table, while I explain for the record that, born in Colorado, Judge Winner went to law school at the University of Colorado, was appointed to the Federal district court bench by President Nixon on December 18, 1970.

I am very grateful to you, Judge, for coming to be with us today, for accepting my invitation to appear. And it would be my hope that you would simply share with us your perspective as one who has been deeply and centrally involved in what has happened thus far.

[A copy of the discussion of volume 25 of the Ohio State Law Journal and Judge Black's written opinion follow:]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA :

v. :

OMNI INTERNATIONAL : CRIMINAL NO. B-84-00101
CORPORATION (formerly known as
Omni Investment Corporation), :
WAYNE J. HILMER,
EVAN T. BARNETT, :
THOMAS A. WESTRICK, JR., and
JOSEPH P. BORNSTEIN :

Filed: May 15, 1986.

J. Frederick Motz, Former United States Attorney for the District of Maryland; and Elizabeth H. Trimble, Catherine C. Blake, John G. Douglass, Ty Cobb, and Steven A. Allen, Assistant United States Attorneys; and John R. Haney, Jr. and Ronald Allen Cimino, Attorneys, Tax Division, United States Department of Justice: for the Government.

Paula M. Junghans and Garbis & Schwait, of Baltimore, Maryland: for defendant, Omni International Corporation (formerly known as Omni Investment Corporation).

Marvin J. Garbis and Garbis & Schwait, of Baltimore, Maryland: for defendant, Wayne J. Hilmer.

Cono R. Namorato, Bernard S. Bailor, and Gaplin & Drysdale, of Washington, D.C.: for defendant, Evan T. Barnett.

Brendan V. Sullivan, Jr., Barry S. Simon, and Williams & Connolly, of Washington, D.C.: for defendant, Thomas A. Westrick, Jr.

James E. Merritt, John W. Spiegel, and Morrison & Foerster, of Washington, D.C.: for defendant, Joseph P. Bornstein.

Black, District Judge.

On March 13, 1984 a grand jury returned a seven-count Indictment against Omni International Corporation, formerly known as Omni Investment Corporation, Wayne J. Hilmer, Evan T. Barnett, Thomas A. Westrick, Jr., and Joseph P. Bornstein. The five defendants each were charged with conspiracy to defraud the Internal Revenue Service, conspiracy to commit income tax evasion, five counts of income tax evasion for the years 1976-1980, inclusive, and aiding and abetting. The Government alleges that Hilmer was the majority owner of Omni and its chief executive officer, and president of Euro Air (a subsidiary of Omni), that Larnett was vice president of Omni and Euro Air, and that Westrick was president of Omni. The Government further alleges that Bornstein, a certified public accountant, prepared or supervised the preparation of the federal income tax returns for Omni.

The defendants promptly filed numerous pretrial motions. All defendants except Bornstein (hereinafter collectively referred to as the Omni defendants) filed motions jointly. Bornstein filed his own motions and also joined in the majority of the Omni defendants' motions. On April 27, 1984, the Omni defendants filed a motion to dismiss the indictment, disqualify government counsel and investigators, and suppress evidence based on violations of the attorney-client privilege (hereinafter referred to as the motion to dismiss). The Government answered this motion on May 11, 1984. Somewhat contemporaneously, Bornstein filed a related motion to dismiss the indictment based, in part, on governmental misconduct. Additional supplemental memoranda have been received in connection with these motions.

A hearing -- which would ultimately require twenty-eight days over an extended period -- commenced on June 11, 1984 on all then-pending motions. The immediate focus of the hearing became the Omni defendants' motion to dismiss. Bornstein participated in the hearing in connection with his own motion. Following legal argument on June 11, proffers by the Omni defendants at that time in court and in their pleadings, and the testimony of two witnesses for the Omni defendants on June 12, the Court held an evidentiary hearing on the Omni defendants' motion to dismiss, with testimony before the Court as finder of fact occurring over the course of twenty-eight days between June, 1984 and March, 1985. The record consists of hundreds of exhibits and over 5,500 pages of testimony.

During the course of the hearing the defendants repeatedly asserted that the Government had deliberately set out to breach the attorney-client privilege, and later tried to conceal its actions by misrepresentation, obstruction of justice, and perjury. According to the defendants, subsequent to the Indictment, an Assistant United States Attorney (AUSA) and two agents of the Internal Revenue Service attempted to thwart the Court's inquiry into their misconduct by creating, altering, and suppressing documents, by making misrepresentations to the Court and defense, and by repeatedly lying under oath. For this alleged deliberate, flagrant and repeated misconduct the defendants seek dismissal of the Indictment.

After the Court heard all testimony relevant to the proceedings which the litigants wished to present, proposed findings of fact and conclusions of law were submitted by the Omni defendants and the Government. Bornstein adopted almost all of the Omni defendants' submissions, as well as submitting his own. The Court heard oral argument on the motion to dismiss on June 25, 1985, and the matter was taken under advisement. This opinion constitutes the Court's findings of fact and conclusions of law.

## I. Attorney-Client Privilege

The basis of the Omni defendants' motion, as originally filed and undoubtedly as originally contemplated by the defendants, was that the Government breached the attorney-client privilege in presenting its case to the grand jury and, thereafter, in preparing for the motions hearing and trial. The requested sanctions for the alleged deliberate breaches are dismissal, disqualification, or suppression. The Government has consistently disputed whether an attorney was even involved in the case, given the fact that the privilege related primarily to communications to defendant Bornstein and his dual role as a certified public accountant as well as attorney; whether any confidential communications were breached; and whether any defendant other than Omni is entitled to claim the privilege in any case. The Government has always maintained that the thrust of the motion relates solely to attorney-client privileges which defendants have failed to prove.

### A. Background

In order to appreciate the arguments raised by counsel at this juncture of the proceedings, the Court will briefly discuss the underlying criminal tax case. Omni, a domestic corporation, buys, sells and leases aircraft world-wide. Hilmer is the majority owner and Chairman of the Board. Westrick, a certified public accountant, is President of the company, and Barnett, also a certified public accountant, is financial Vice President. Bornstein, an attorney as well as a certified public accountant, was Omni's outside counsel and tax advisor. For the years in question, 1976-1980, inclusive, Bornstein signed the relevant Omni tax returns.

The Government investigated Omni for a period of years prior to the return of the Indictment, considering various alleged crimes before focusing on tax issues. Enormous manpower and resources were devoted to the effort; the case consumed more than 2000 man-days and required the full-time attention of several investigators. The primary Internal Revenue agents who were involved in the investigation, especially in late 1983 and 1984, will be referred to throughout this opinion as the Special Agent and the Revenue Agent. This Special Agent directed the entire investigation as it drew to a close and prosecutorial decisions were being made. The primary function of the Revenue Agent was to assist the Special Agent. The IRS, through many agents, conducted interviews on three continents. The other principal Government representative involved is the Assistant United States Attorney (AUSA) who supervised the investigation and presented the case to the grand jury. This individual will be referred to as the AUSA throughout the opinion.

The investigation focused ultimately on Omni's wholly-owned Bermuda subsidiary, Euro Airfinance, Ltd (hereinafter referred to as Euro Air). The Government contends that income reported on Euro Air's information returns was properly taxable to Omni and that tax should have been paid in the year that the income was earned. According to the Government, the defendants evaded taxes by falsely reporting income in the name of Euro Air, when the income in fact belonged to Omni, a domestic corporation. Omni allegedly has not paid taxes on millions of dollars of income passed along improperly to Euro Air.

As the Government put its case together against Omni, the attorney-client privilege issue surfaced. Omni claimed the privilege based on its relationship with Bornstein. In particular, in the Fall of 1983 the Government sought production of Bornstein's invoices to Omni in order to trace expenses and tie Bornstein to particular transactions. Omni asserted that those invoices were not producible pursuant to subpoena because they were subject to the privilege. The AUSA filed a motion to compel their production. On November 8, 1983, Judge Joseph H. Young of this District ruled that there was a privileged attorney-client relationship between Bornstein and Omni and that the invoices need not be produced because "statements or correspondence showing the _nature_ of the legal services performed are covered by the attorney-client privilege," and the invoices would reveal the "type of work performed by Bornstein for the client and the particular legal matter which Bornstein worked on." (emphasis in original) This was the first -- and only -- ruling relative to the subject of attorney-client privilege in these proceedings. It is significant that Judge Young considered Bornstein to be an attorney and found that the invoices were privileged. The evidence before the Court is overwhelming that Bornstein acted as Omni's attorney.

At least from that point on, Omni vigorously asserted the privilege. Yet the Government recognized that discussions between Omni and its lawyers were significant with regard to the tax theory of prosecution and undertook to obtain all the information it could. The Government, particularly the Special Agent and the Revenue Agent, attempted to circumvent the privilege. In pursuing their goal, the agents interviewed numerous attorneys who had represented Omni. Notes taken by the agents prior to at least one interview reveal the agents' intent. The first page of notes taken before an interview of William Green shows that the agents planned to ask Green "what did they [Omni] present to him," and "what did he say to them about the law."[1] To ascertain whether Omni had obtained the advice of Green as to several aircraft transactions involving Euro Air, the agents presented the attorney with several "hypothetical" fact patterns, each based precisely upon an actual Euro Air aircraft transaction. The agents took the actual facts of transactions under investigation, converted them to hypotheticals, and asked Green whether or not he had heard these hypotheticals previously. The agents asked the attorney what tax advice he would give in response to the hypotheticals.

In addition to seeking privileged information from Omni attorneys, the agents sought information from former Omni employees. The Government granted informal "pocket immunity" to Samuel Russell,

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[1] The sources of all quoted material in this opinion are either the exhibits or the hearing transcript unless otherwise indicated. However specific citations have been omitted because of the extraordinary volume of the record in this case.

Omni's former assistant controller, and obtained from him letters written by William Green to Bornstein, summarizing tax advice regarding Euro Air. When Russell finally appeared before the grand jury, the AUSA asked questions which related to tax advice given by attorneys to Omni. The agents also granted informal immunity to Seth McCormick, a former Omni controller. Once again, the agents attempted to discover privileged information.

The two most significant events which relate to the attorney-client privilege, as it developed during the evidentiary hearing, involved Bornstein, directly and indirectly. Beginning in July, 1983, Bornstein was represented by the Washington, D.C. law firm of Steptoe & Johnson, specifically Gerald Peffer, James Bruton, and Greg Gadarian. Several meetings occurred between Bornstein's attorneys and the AUSA, with the attorneys attempting to learn what allegations were being made against their client. The investigation continued and the Government considered bringing charges against Bornstein.

Pursuant to Department of Justice regulations, the Tax Division must approve any criminal tax prosecution, with minor exceptions not applicable here. If requested, the Tax Division will provide potential defendants an opportunity to have a conference with an attorney from the Division. This attorney acts as a reviewer of the factual and legal position of the IRS and recommends to his superiors whether or not prosecution should be authorized. The purpose of the conference is to provide the potential defendant an opportunity to demonstrate why prosecution is unwarranted.

On October 31, 1983, a conference on behalf of Bornstein occurred at the Department of Justice. At that time Bornstein's attorneys attempted to convince the reviewing attorney at the Tax Division, Mark Friend, that the Government lacked a viable theory of prosecution against their client. The AUSA attended the meeting. The meeting was extremely unusual in its scope, length, and candid discussion of the tax issues. Bornstein's attorneys made a full factual and legal analysis during the conference, addressing each area that had been identified by the Government as a matter for concern. Immediately after the meeting, Friend told the AUSA that there was a question in his mind about the basis for proceeding in the case. Friend particularly expressed concern about the sufficiency of the evidence against Bornstein.

The AUSA thereafter contacted Bornstein's attorneys and stated that the IRS agents who had worked on the investigation for several years wished to hear the presentation that had been made at the Justice Department. The AUSA noted that, as a matter of fairness and because the agents had spent three years developing a case, the conference at Justice should be "replayed" for the agents. The request struck the attorneys as unusual in their collective careers, but they consented to a replay of the October 31st conference.

Such a meeting took place on November 18, 1983. Bornstein's attorneys began by presenting the reasons why they believed the Government's theory of the case against their client was legally untenable. Early in the meeting the IRS agents began arguing with the attorneys, questioning their interpretation of the law. The tone of the meeting became argumentative and heated. For the first time, the Special Agent raised issues concerning alleged documents in Bornstein's safe deposit box that could be used to blackmail Hilmer. If such documents existed, they would demonstrate Bornstein's knowledge of and participation in fraud being committed by his clients. Defense counsel were upset that a new allegation was being raised for the first time at such a late date. Bornstein's attorneys impressed upon the Government that it lacked any witness against Bornstein and thus a case in which the Government had to prove criminal intent would inevitably fail. Defense counsel responded to the allegation of the safe deposit box by stating: "You don't have a witness that implicates Bornstein, you don't have a witness." The meeting ended acrimoniously.

On November 22, 1983, only two weeks after Judge Young upheld Omni's privilege claim with regard to the invoices, and two business days after the meeting occurred with Bornstein's attorneys, the Special Agent and Revenue Agent travelled to the residence of Sandra Poe Wilkins, a former secretary to Bornstein. The decision to interview Wilkins was made in response to challenges by Bornstein's attorneys that the Government was operating on innuendo and did not have a witness against Bornstein. The agents arrived unannounced, presented a grand jury subpoena to Wilkins that had been prepared on November 21, and offered Wilkins, in lieu of appearing before the grand jury, an opportunity to talk directly with the agents.

Wilkins consented and the agents then interrogated her for at least five hours. The agents specifically questioned her about her knowledge of Bornstein's activities and what advice Bornstein had given to Omni.

Subsequent to the interview the agents prepared a typewritten memorandum which purported to relate the substance of the matters discussed. According to the memorandum, which at that time was not disseminated to anyone other than the AUSA and other IRS investigators, Bornstein clearly had knowledge of criminal activities undertaken by the Omni defendants. According to the memorandum, Bornstein told Wilkins that in the event anything ever happened to him, he had documents in a safe deposit box which would prevent Omni from pinning anything on him. Wilkins also made several statements that appear to be privileged.

Following the interview the AUSA informed Bornstein's attorneys that the interview had created serious problems for their client. The AUSA arranged a meeting for the Special Agent and the Revenue Agent to inform the attorneys of the evidence that Wilkins had provided to the agents during the interview. When the "debriefing" actually took place on December 15, 1983, the agents provided few details. Bornstein's attorneys stated that there were no incriminating documents in any safe deposit box. The Special Agent said that it was frustrating to deal with the attorneys, instead of directly with Bornstein. At the meeting, the agents did not volunteer the information about the Wilkins interview as Bornstein's counsel had anticipated. The Special Agent stated that he did not want to disclose the substance of the Wilkins interview and then said words to the effect: "I hope I am not stepping on any toes here [turning to the AUSA], but it would be really helpful to me to see Mr. Bornstein respond to these questions." Bornstein's counsel avoided the issue and asked further about the safe deposit box. The Special Agent later repeated his request to speak directly with Bornstein. The AUSA then also stated that "I thought we would get a chance to talk with Mr. Bornstein at some point."

To summarize this sequence of events, the desire of the AUSA, Special Agent, and Revenue Agent to talk with Bornstein intensified after the October 31st conference. Bornstein's attorneys had demonstrated a weakness in the case against their client. The AUSA, Special Agent, and Revenue Agent knew that Friend had concerns about the case, particularly with the lack of evidence against Bornstein. They knew that information was needed if the case was going to go forward. Their witness would be either Wilkins or Bornstein himself.

On the advice of his attorneys, Bornstein consented to make a proffer as suggested at the December 15 conference. On December 23, 1983, Bornstein's attorneys filed an application with the Court for an order permitting an off-the-record proffer to the Government. The application sought permission to disclose attorney-client confidences and other information necessary to defend himself against the proposed criminal indictment. Authority for the proffer was found in a portion of the Code of Professional

Responsibility, DR 4-101(C)(4), which permits an attorney to disclose confidential communications made to him by a client in the attorney's own self-defense: "A lawyer may reveal . . . [c]onfidences or secrets necessary . . . to defend himself or his employees or associates against an accusation of wrongful conduct." This provision affects the limitations otherwise imposed on the attorney by the attorney-client privilege. The Omni defendants vigorously challenged Bornstein's right to make a proffer and requested the opportunity to intervene, to be heard with respect to the scope, if any, of the breach of the attorney-client privilege, and to limit the use of any privileged disclosures which may have been made.

On January 12, 1984, after hearing arguments from Omni, Bornstein, and the Government, Judge Young issued an opinion setting forth the procedures that he would require Bornstein and the Government to follow for the proffer. Judge Young, again recognizing that Bornstein was an attorney, allowed the proffer to proceed but only under certain conditions "which will ensure that the rights of the attorney's former clients are not compromised, or that, if they are compromised, the clients will be able to seek appropriate remedies." Judge Young ruled that

> The government will be ordered to submit to the Court for in camera inspection by January 16, 1984, a list of the questions and the general areas of inquiry it wishes to pursue with the attorney. The attorney will then have until January 23, 1984, to submit to the Court, again for in camera inspection, his responses to the questions propounded by the government. At that point, the Court will issue a ruling on the appropriate areas of inquiry, and the proffer of evidence may proceed, as long as the inquiry does not stray

> from the bounds set by the Court. The proffer of the evidence presented by the attorney will be stenographically recorded and the record will be sealed pending further order of the Court. The preliminary _in camera_ inspection will afford the Court the opportunity to determine that the inquiry is relevant, and that the disclosure by the attorney does not exceed that allowed by Disciplinary Rule 4-101(C)(4).

Judge Young subsequently ruled on February 7, 1984 that "the purpose of the inquiry is for Mr. Bornstein to attempt to convince the government that he should not be indicted and that the questions asked of Mr. Bornstein, and his responses to those questions, are to be used for no other purpose."

The Omni defendants appealed Judge Young's ruling to the United States Court of Appeals for the Fourth Circuit. On February 8, 1984, argument before the appellate court concerned whether Judge Young's order should be stayed pending formal appeal. On March 5, 1984 the Fourth Circuit denied the stay. That Court approved the procedures enumerated by Judge Young, recognizing that Bornstein was an attorney, but that the procedures protected the confidentiality of the attorney-client privilege.

Bornstein, in fact, made a proffer to the Government on March 9, 1984. After the proffer the Government determined that Bornstein was not credible. Four days later the grand jury returned an indictment against Omni, Hilmer, Westrick, Barnett, and Bornstein.

B. _Conclusions_

The above-described events constitute the sum and substance of the major alleged breaches of the attorney-client privilege. Most of the alleged breaches -- such as the statements of the two former controllers of Omni who allegedly revealed privileged information -- were known to the Omni defendants even before the hearings began. Under close examination it is clear that the alleged breaches of the privilege do not rise to the level at which this Court would consider dismissal of the indictment or disqualification of the AUSA or the IRS agents. It is doubtful whether, in any event, dismissal of the indictment would be appropriate for breaches of the attorney-client privilege, no matter how flagrant the intrusion. *See* *United States v. Morrison*, 449 U.S. 361, *reh'g denied*, 450 U.S. 960 (1981); *United States v. Gatto*, 763 F.2d 1040, 1046 (9th Cir. 1985).

In light of the limited showings made by the defendants during the hearing, this Court need not address at length the law of attorney-client privilege. The purpose of the privilege is to encourage free consultation and the complete and unimpeded flow of information between clients and their counsel, thereby "promot[ing] broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Fisher v. United States*, 425 U.S. 391, 403 (1976). Nonetheless, because the privilege "impedes the investigation of the truth," it "must be strictly construed." *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984). In the Fourth Circuit, the privilege "is not 'favored' and is to be 'strictly confined within the narrowest possible limits.'" *In re Grand Jury Proceedings (John Doe)*, 727 F.2d 1352, 1358 (4th Cir. 1984).

With respect to every specific communication that is claimed to be privileged, defendants bear the burden of proving each of the following elements:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950); see United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982). A recent Fourth Circuit decision, United States v. (Under Seal), 748 F.2d 871, distinguishes between public and private transactions in a manner that impacts on the question of privilege: for public transactions, such as filings with the Securities and Exchange Commission, none of the underlying discussions are privileged, because the communications are presumptively made with the expectation of public disclosure; however, for unconsummated, private transactions, such as a potential commercial deal that the client ultimately decides not to pursue, all communications relating thereto remain privileged. As stated in (Under Seal), communications that "relate to contemplated public actions . . . do not exhibit a reasonable expectation of confidentiality" and are not privileged. Id. at 877. The complexities inherent in this distinction need not concern this Court here.

Defendants have failed to meet the burden imposed on them. The proffer by Bornstein concededly did include matters which reveal confidential communications that ordinarily would be subject to the privilege. But Judge Young and the Fourth Circuit explicitly and specifically approved this procedure. And this procedure appears contemplated by the Code of Professional Responsibility. The Omni defendants do not contend that the Government strayed afar from Judge Young's mandate. The Government has never had access to the proffer. Moreover, the information obtained in the proffer cannot, by the terms of the proffer, be used against Omni at trial.

The other episode to which the parties have given much attention concerns the November 22, 1983 interview of Sandra Poe Wilkins. The Court will later discuss the propriety of the interview. See United States v. Valencia, 541 F.2d 618 (6th Cir. 1976). In the context of the motion, however, it is clear that Wilkins revealed no confidential communications. In their Proposed Findings, the Omni defendants identify only two items subject to the privilege. The first is that Bornstein advised Omni to file an amended tax return for an unspecified year, but that Omni refused to do so. The defendants show only the statement and do not show enough surrounding information for the Court to conclude that the statement is even privileged. Similarly, the defendants fail to show that Wilkins' statement that "Omni sought legal advice about the formation of aircraft registry in Liberia" was privileged. Wilkins' own testimony at the hearing indicates that she divulged nothing of any significance. The Government certainly tried to breach the privilege in its interview of Wilkins, but it failed.

The Omni defendants also place great weight on the number of interviews undertaken by the IRS of various Omni attorneys. The mere fact of an interview of an attorney who rendered legal advice is not controlling. No authority has been cited to the Court for the proposition that it is misconduct for a Government agent to interview an attorney, and to ask questions which relate to legal advice. In fact, in United States v. Rogers, 751 F.2d 1074, 1080 (9th Cir. 1985), the Court found no misconduct in an interview of an attorney conducted by an IRS agent. In Rogers, the legal advice given by the attorney to the target of the investigation was the subject of the agent's questions.

Additionally Omni must demonstrate "not only that an attorney-client relationship existed, but also that the particular communications at issue are privileged and that the privilege was not waived." United States v. Jones, 696 F.2d at 1072. Omni has failed to do so.

Attorneys are cognizant of the limits of the privilege. Attorneys are better informed than investigating agents on the applicable law and particular facts presented to them to make judgments about compliance with the attorney-client privilege. Attorneys will not readily disclose confidential communications. This Court is confident that attorneys possess the ability to defend vigorously their clients' interests, even when interviewed by government agents. See, e.g., United States v. Rogers, 751

F.2d 1074; *United States v. Rasheed*, 663 F.2d 843, 854 (9th Cir. 1981), *cert. denied sub nom. Phillips v. United States*, 454 U.S. 1157 (1982); *In re Walsh*, 623 F.2d 489, 495 (7th Cir.), *cert. denied*, 449 U.S. 994 (1980); *United States v. Wolfson*, 558 F.2d 59, 66 (2d Cir. 1977). Therefore, when the agents asked a former Omni attorney questions in the form of hypotheticals, as opposed to direct issues, the attorney was fully capable of protecting any privileged information and would have declined to answer the hypotheticals if an answer would have violated the privilege. The agents may have set out to breach the privilege, by asking the attorney about advice he gave his client, but it then becomes incumbent on the attorney either to refuse to discuss the matter in an interview or to testify before the grand jury, or to risk a civil suit against him for revealing confidential communications.

With respect to other interviews, in some situations the defendants have failed to identify what communications were even made. Alternatively, the nature of the matters discussed clearly falls within the ambit of *(Under Seal)*, and therefore is not privileged.

In sum, the extent to which the attorney-client privilege may have been violated, if at all, does not compel the conclusion that the indictment should be dismissed, or that Government prosecutors or investigators should be disqualified. Later in this opinion, *see infra* section III, the Court will discuss whether evidence should be suppressed.

## II. Prosecutorial Misconduct

The Omni defendants' motion, which began as a not atypical pretrial motion to dismiss the indictment, changed as the hearing progressed; it became a motion to dismiss based largely on government misconduct committed before this Court during the hearing itself. Government misconduct, possibly rising to the level of perjury and obstruction of justice, became the real essence of the motion. At the outset of the hearing, the defendants brought into question the Government's conduct in the investigation, particularly focusing on various documents. During the course of the extended hearing, that conduct became the focus of the hearing and the most troubling matter to the Court.

There are three general categories of concern into which all relevant issues fall, albeit with some overlap: documents altered or created after the Omni defendants' motion was filed and the attorney-client privilege issue was raised; incorrect testimony before the Court, along with the criminal allegations of perjury and obstruction of justice, largely in connection with the documents referred to in the first category; and, a disheartening lack of candor in colloquies with and testimony before the Court.

### A. Documents

The first area of grave concern to the Court involves the creation and alteration of documents which were subsequently turned over to the defendants in preparation for the hearing. Particularly troublesome is the timing of the preparation of the documents, namely after an issue was raised in litigation, and the failure of Government personnel to state candidly what had been done.

The Omni defendants filed their motion to dismiss on April 27, 1984. The motion, along with then-pending discovery requests, directed the Government's attention to possible violations of the attorney-client privilege. The Government then embarked on a project of generating documents which would respond to the issues. In so doing, the Government ultimately produced ten relevant documents. The memoranda relate to interviews conducted by Government agents with the following individuals on the following dates:

> Defendants' Exhibit 4: Interview of William Green (a New York attorney who met with Bornstein at a public conference in 1980 and later met with Bornstein and certain Omni officers) on September 15, 1983.
>
> Defendants' Exhibit 5: Interview of William Green on August 24, 1983.
>
> Defendants' Exhibit 6: Interview of John Campbell (a Bermuda attorney and a director of Euro Air) on July 25, 1983.
>
> Defendants' Exhibit 7: Interview of Sandra Poe Wilkins (Bornstein's former secretary) on November 23, 1983.
>
> Defendants' Exhibit 8: Interview of Sandra Poe Wilkins on November 22, 1983.
>
> Defendants' Exhibit 9: Interview of Martin Redler (an accountant employed in Bornstein's accounting office) on September 7, 1983.
>
> Defendants' Exhibit 11: Interview of Martin Redler on August 24, 1982.
>
> Defendants' Exhibit 12: Interview of Samuel Russell (former controller of Omni) on February 23, 1983.

> Defendants' Exhibit 21: Interviews of Seth McCormick (former controller of Omni) on August 20, 1981, November 5, 1982, and August 5, 1983.
>
> Defendants' Exhibit 35: Interviews of David Candler (former controller of Omni) on April 28, 1982 and February 29, 1984.

At least nine of these documents, and probably all ten, were either created or altered by Government personnel after the defendants filed their motion and before the hearings began on June 11, 1984. The Government filed its answer to the motion on May 11, 1984. In that response the Government represented that it had "provided all defendants with all memoranda in its possession reporting the substance of those interviews". That representation was incorrect. After the filing of this answer the Government continued to generate and produce memoranda of interviews.

Between the time when the Omni defendants filed their motion and the Government filed its response, Government personnel altered a typewritten memorandum of the November 22, 1983 interview of Sandra Poe Wilkins (Defendants' Exhibit 8). A preexisting version of the interview memorandum, which eventually surfaced in various individuals' files during the hearings, had been initially prepared by the Special and Revenue Agents the week after Thanksgiving, 1983. The document was certainly finalized before December 15, 1983. The final version was delivered to the AUSA in charge of the case and Mark Friend, the reviewing attorney at the Tax Division of the Department of Justice. The 1983 version of the memorandum mentions that Bornstein wrote memos to Omni concerning the taxability of controlled foreign corporations. It then states: "The contents of those memos were not discussed due to the attorney/client privilege." The altered version of the memorandum, prepared between April 30, 1984 and May 8, 1984, states: "We told Wilkins that we did not want to discuss the contents of those memos due to the attorney/client privilege." The change from passive to active voice in this sentence made the agents appear sensitive to the very issues raised in the hearing.

A second document altered during this time frame was an interview memorandum concerning one of the attorneys contacted by the agents, William Green (Defendants' Exhibit 5). Reference has previously been made to this interview because, in the course of that interview, the agents posed "hypothetical" aircraft transactions. In the preexisting version of the memorandum prepared shortly after the interview on August 24, 1983, it is clear that hypotheticals posed to Green were actually based on five specific aircraft transactions that were the subject of the Government's investigation and which are encompassed in the Indictment. The memorandum suggests that Green was "hesitant" to discuss details of his conversations with Omni officials because of possible violations of the attorney-client privilege, and that he "therefore" provided general information. The memorandum indicates that the agents were interested in obtaining the specific information provided to Green by his clients, and the specific advice he would have provided in response.

In the altered version the memorandum states that during the "meeting" with Green, "he would not" discuss the details of his conversation because of the possible violation of the privilege. This modification attempted to put the conduct of Government personnel in a better light and the question of breach of the privilege during the interview in a different perspective. There is no reference to any particular aircraft in the altered version, which simply refers to "hypothetical sales" described in general terms. The altered version also adds the sentence that Green "never stated an opinion as to whether the [hypothetical] sales were taxable or non-taxable." No corresponding statement exists in either the preexisting version of the memorandum or the handwritten notes of the interview.

A third altered memorandum is of an interview of Samuel Russell on February 23, 1983 (Defendants' Exhibit 12). A preexisting, nine page version of that memorandum was prepared in 1983. An altered, seven page version was prepared after April 27, 1984. The Government concedes that the changes are not merely grammatical corrections, but do involve matters of substance. First, the last paragraph of page three of the preexisting version describes a meeting between Omni personnel and Green. After a statement that Green spent about one day in Omni's office and discussed the foreign taxation laws, the memorandum states that "Russell said that Omni's officers appeared to be concerned and shaken by what they had heard." In the altered version, the phrase "appeared to be concerned and shaken by what they had heard" is deleted.

The pre-existing version also states:

> Russell said that during all the conferences with attorneys and discussions concerning the foreign corporation he asked Bornstein how things had gotten so 'fouled up'. Russell said that by this he meant the several issues which he had noted during the course in New York and they had discussed previously such as the improper reporting of airplane sales on the books and records of Euro Airfinance.

This paragraph suggests more than one conference between Russell and Bornstein about matters getting "fouled up." It also specifically indicates that there were not only conversations during the conferences at New York, but also previous discussions concerning reporting of aircraft sales on the Euro Air books. The altered version states, by contrast:

> Russell said that during the return flight from New York following the accounting course, he asked Bornstein how things had gotten so 'fouled up.' Russell said that by this he meant the several issues which he had noted during the New York course and discussed above such as the improper reporting of airplane sales on the books and records of Euro Airfinance.

The interview memorandum of Seth McCormick (Defendants' Exhibit 21), was certainly prepared after the indictment. In all likelihood the document was prepared after the attorney-client privilege issue was raised. After the motion was filed the AUSA instructed the agents to insert the three dates borne on the document. Without dates the defendants would have reasonably assumed that the memorandum was based on one undated interview. With the three dates, however, the defendants could reasonably have assumed that the compilation memorandum constituted all of the interviews of McCormick.

Although none of the above described changes are earth-shattering, they do involve matters of substance. The appearance of sensitivity to attorney-client privilege questions mattered greatly to the Government. Subtle shifts in tone, such as the statement that "We told Wilkins that we did not want to discuss the contents of those memos due to the attorney/client privilege" instead of "The contents of those memos were not discussed due to the attorney/client privilege," could have been significant to the Court. In any event, the Court condemns the practice of altering and revising documents once the matter is in litigation without disclosure that such an alteration had occurred. The impropriety was not corrected by providing the underlying notes and preexisting memoranda under pressure during the course of these proceedings; it was wrong for Government personnel to so act, and the Government's action was aggravated by its reticence in stating what had been done.

Compounding the major error in producing altered documents without an explanation of the alteration was the Government's failure to admit its mistake, to candidly inform the Court and defense counsel of the changes, and to minimize the harm done. If defense counsel in a criminal case received a subpoena and made "minor" modifications to the documents sought, allegedly to clarify errors in style and grammar, the Court is certain that the process by which such changes were made would be cause for major concern to the Government, and would probably lead to the threat of criminal prosecution. Whatever the intent might have been in such a hypothetical situation seems quite beside the point; such conduct is wrong and strikes at the heart of fundamental values in our adversary system of justice.

Justice cannot function in a system in which one side feels free to make even minor modifications which only aid its position slightly, without informing the other side of its actions. Trust and confidence in the system would be lacking. Minor modifications today could become significant alterations tomorrow, based on the judgment of the reviser. Prohibiting such action must be the rule whether the changes are made by defense counsel or government counsel. This must be true even when, as here, the underlying documents are finally produced. Our system cannot rely on lengthy evidentiary hearings in which a collateral document search is conducted and the true manner of preparation is exposed. The appropriate documents must be turned over at the outset and in unaltered form.

In addition to altering preexisting documents during this time frame, and producing said documents to defense counsel without a representation that alterations had been made, Government personnel created typewritten interview memoranda during this period. The typed memoranda were prepared from handwritten notes taken at the time of the interview, but the memoranda were only prepared after defense counsel raised the issue of attorney/client privilege.

The Special Agent initially prepared an interview memorandum pertaining to Martin Redler (Defendants' Exhibit 5) on May 3, 1984, one week after the Omni defendants filed their motion to dismiss. The AUSA edited the document before it was produced to defense counsel on May 8, 1984. The memorandum was based on handwritten notes taken during an interview on September 7, 1983. It bears only the date of the interview and not the date of preparation. From the face of the document it would appear that the memorandum had been prepared in September, 1983, or soon thereafter. Creating this erroneous impression and, worse yet, not correcting the resultant misunderstanding, was wrong.

The IRS earlier had conducted another interview of Redler on August 24, 1982. The Special Agent initially dictated the typewritten memorandum (Defendants' Exhibit 11) once again on May 3, 1984. The AUSA again reviewed and edited the document before it was produced to the defendants on May 3, 1984. The typewritten version bears only the date of the interview and ordinarily one might assume from this date that the memorandum had been prepared contemporaneously with the interview. Once again, the Government failed to properly inform defense counsel that the document had been prepared months after the interview, after the attorney-client privilege issue had been raised. In connection with this document the Government produced during the hearings a draft typewritten version which could not have been initially prepared prior to May 3, 1984. The second page of the draft memorandum reflects that "to the best of Redler's knowledge, Windsor is either working in Las Vegas or Atlantic

City at a gambling casino at the time of the interview." The Special Agent changed this sentence to read, in the final version: "to the best of Redler's knowledge, Windsor is currently working in Las Vegas or Atlantic City at a gambling casino." This change could have been made either to clarify an awkward sentence, with the word "currently" inserted to refer to the August 24, 1982 date of the interview, or to suggest to the reader of the document that the memorandum had been prepared contemporaneously with the interview. In light of the Special Agent's credibility and demeanor as a witness, which will be discussed in greater detail below, the Court finds that this change also was made in an attempt to obfuscate the date of preparation.

By letter to the AUSA dated May 14, 1984 the defense specifically sought information concerning when various memoranda were prepared and by whom, as well as the underlying handwritten notes. The Omni defendants mentioned Wilkins, Russell, Green, and McCormick by name. Following this notification the Government prepared other typewritten memoranda. These memoranda were created after defense counsel specifically inquired about when memoranda were prepared and who prepared them. The Government failed to admit that the documents were created at that very time, specifically in response to issues raised by defendants. One interview memorandum (Defendants' Exhibit 4), relating to a September 15, 1983 interview of William Green, contains statements not found in the handwritten notes of the interview. This memorandum also contains self-serving, editorial comments by the Special Agent which appear to show

Government sensitivity to the very issues being raised by defense counsel. The typewritten version states

> We told Green that it was our understanding that he had provided information to Bornstein and Omni for use in preparation of their income tax returns. It was our interpretation of the law that this would not constitute a violation of the attorney-client privilege, although we made several attempts to describe hypothetical situations, Green would not provide any information as to his advice or what advice he would provide to a client had they asked a question similar to the hypotheticals that we described.

The Special and Revenue Agents interviewed Sandra Poe Wilkins, the former secretary to Bornstein, on November 22 and 23, 1983. The alteration of the preexisting version of the November 22, 1983 interview memorandum (Defendants' Exhibit 8) has been previously described. The agents also created a typewritten memorandum, bearing no date of preparation, for the November 23, 1983 interview (Defendants' Exhibit 7). This document was prepared between May 14, 1984 and May 18, 1984.

After the return of the Indictment the Special Agent created a memorandum purporting to summarize discussions with David Candler (Defendants' Exhibit 35). The memorandum omitted Candler's disclosure that commission payments were discussed with an Omni attorney, which potentially would impact on the attorney-client privilege.

The last matter worthy of specific discussion by the Court involves a typewritten memorandum of an interview of John Campbell which had occurred on July 25, 1983 (Defendants' Exhibit 6). This memorandum was in fact prepared no earlier than May 29, 1984, and it bears only the date of interview. On May 24, 1984 the defense issued subpoenae duces tecum calling for documents relevant to the motion to dismiss. The subpoenae specifically called for, once again, interview memoranda. On June 6, 1984, the Government filed a motion to quash the subpoenae. The Government represented that all witness statements arguably relevant had been turned over to the defendants. On that same day the Government sent to the defendants an interview memorandum for the Campbell interview. This memorandum was prepared after the motion was filed, the Government had answered the motion, and the defendants made additional specific requests for memoranda by serving subpoenae. Once again, the Government failed to indicate that the document was generated at the very time it was produced.

As was the case with the altered documents, the Court is shocked and dismayed by the Government's approach to document production. It was an egregious error for the Government to create documents and turn them over to defense counsel as if they had been prepared contemporaneously with the interviews. This impropriety was particularly acute because there existed a pending motion to dismiss and request for evidentiary hearing which would be based on the contents of the memoranda. While it may be appropriate in certain circumstances to create a typewritten memorandum of an interview after an issue is raised in litigation, it is inappropriate not to indicate that just that course of action has been followed.

To summarize, the Government created and altered at least nine, and probably all ten, relevant documents which were the source of the defendants' motion to dismiss after the attorney-client privilege issue surfaced. Production was made without acknowledging that the documents had just been prepared, even though from the face of the documents one could erroneously conclude that the documents were prepared contemporaneously. These errors were exacerbated by erroneous testimony at the evidentiary hearing given by the Special Agent, Revenue Agent, and AUSA, to which the Court now turns.

### B. Testimony

The second major area of concern to the Court involves the repeated untrue and incorrect testimony which occurred during the course of the proceedings. The impact of such testimony to this Court, sitting as fact-finder for the evidentiary hearing, cannot be underestimated. Based on the erroneous testimony given, as uncovered during the hearing, the Court simply cannot put its complete trust and confidence in certain Government witnesses. Untrue testimony occurred in connection with the documents created and altered after the motion to dismiss was filed, discussed above. Untrue testimony also occurred in connection with the interview of Sandra Poe Wilkins on November 22, 1983, and with the use of the typewritten memorandum subsequently prepared. Other examples of such testimony will be set forth as the Court continues to make its findings of fact. The sheer magnitude of the erroneous testimony prejudiced the defendants and the Court.

The Special Agent who was in charge of the investigation beginning in the Fall of 1983 took the witness stand for the first time on June 12, 1984. This agent continued his testimony when the hearings resumed in September, 1984. The testimony was wrong in numerous respects. When the agent began to testify in June, the Omni defendants immediately sought to date the preparation of the ten documents. Many of these documents were dictated, prepared, or modified by the agent within the month prior to his testimony. He repeatedly and vociferously, without hesitation or doubt, indicated several of the documents had been prepared in 1983. This testimony was incorrect. The agent also was unwilling to testify as to the dates of preparation of other documents. The Court finds that the agent must have been able to recall documents he had prepared within several weeks of his testimony, and this testimony therefore was inaccurate, and misleading as well. As the evidence unfolded it became clear that at least nine, if not all ten, of the documents in question had been prepared no earlier than May, 1984.

Although tedious, it is necessary for the Court to recount some of the agent's untrue or misleading testimony with regard to the interview memoranda.

Defense counsel asked the Special Agent when Defendants' Exhibit 4, the memorandum of interview of William Green that occurred on September 15, 1983, was prepared. The agent responded: "I can't say exactly. It wouldn't have been within a day or two of the interview . . . I don't recall specifically when it was prepared." The questioning continued:

> Q: Well was it prepared since the first of the year [1984]?

> A: I believe that this one was . . . . I believe that this particular memorandum was probably prepared sometime this year, but I can't be certain of that.
>
> Q: Was it prepared since the return of the indictment in this case?
>
> A: I believe it may have been, but again I can't say with certainty . . . .
>
> Q: Was there a reason why this memorandum was prepared after the return of the indictment?
>
> A: No, nothing particularly comes to mind as to why it would have been specifically after the indictment.

This testimony was wrong and incomplete; the agent prepared the memorandum in May, 1984.

Testimony was also incorrect with regard to the preparation of the memorandum of interview of Green that had occurred on August 24, 1983 (Defendants' Exhibit 5). When questioned about the date of its preparation, the Special Agent responded: "This memorandum, I believe, was actually prepared by [the Revenue Agent] and I am not certain when this one was prepared." In fact, the Special Agent played a significant role in the editing process along with the Revenue Agent when the document was revised in May, 1984.

Defense counsel asked the Special Agent about the preparation of the Campbell interview memorandum (Defendants' Exhibit 6), which was later proven to have been generated by the agent on May 29, 1984, only two weeks prior to his testimony:

> Q: When was this memorandum prepared?
>
> A: Again, I can't say with certainty, Mr. Simon, as to an exact date. In this particular interview, I even had a problem narrowing it down as to some time.

> It would have been, let me explain it this way if I might, it wouldn't have been a day or two after the interview [which had been conducted on July 25, 1983]. It probably was several months after that, but I believe it was within say several months of that interview.

This testimony was repeated on several occasions.

Defense counsel inquired about the preparation of the second Wilkins interview memorandum (Defendants' Exhibit 7). The interview occurred on November 23, 1983. The agent testified wrongly about when the interview memorandum was prepared: "I think that this was [prepared] just prior to Thanksgiving weekend and that memorandum was dictated, I would say, the following Monday or Tuesday [November 28, or 29, 1983]." This particular document, in fact, was initially prepared between May 14 and May 18, 1984. Similar testimony was given with regard to the other Wilkins interview memorandum (Defendants' Exhibit 8), pertaining to the interview on November 22, 1983. When asked when the memorandum was dictated, the Special Agent testified: "Approximately the same time as the other memorandum [the November 23rd interview of Wilkins], I believe. This would have been within a couple of days of the following week. The memorandum was . . . I would say within approximately a week of that time the memorandum was prepared." Defendants' Exhibit 8, in fact, was revised in May, 1984 from a preexisting memorandum.

Similar misstatements were made with regard to the Hedler interview memoranda: "[Exhibit 9] was prepared relatively soon after the interview itself, within a week or ten days [September 14-17, 1983]." Furthermore, Exhibit 11

> A: would have been prepared probably at approximately the same time as [Exhibit 9] was prepared.

> Q: So it was prepared approximately one year after the date of the interview [i.e., August, 1983]?
>
> A: I believe that is correct.

The agent, in fact, dictated both memoranda on May 3, 1984.

Finally, the agent was asked by defense counsel about the preparation of the Russell interview memorandum based on a February 23, 1983 interview (Defendants' Exhibit 12). That memorandum was, in fact, prepared from a preexisting memorandum in May, 1984. Nonetheless, the testimony was as follows:

> Q: When did you prepare that memorandum?
>
> A: I couldn't say with certainty.
>
> Q: Was that after the first of the year?
>
> A: I don't believe so. I believe this memorandum was prepared prior to June of '83 and it is dated February 23, '83.
>
> Q: Sometime prior to June but approximately June of '83?
>
> A: No. I am saying between February and June of '83.

The agent further failed to inform the Court of a preexisting memorandum.

The Government minimizes this testimony. According to the Government, the argument made by defendants is that the memoranda were "passed off" as contemporaneous. The Government states that this argument cannot be true. The Government supports its argument by noting that two of the memoranda show on their face that they are not contemporaneous and are, instead, compilations (*e.g.*, Defendants' Exhibits 21 & 35). Although the Government likely did not intend to mislead defense counsel and the Court about the preparation, the simple fact is that no one knew when the documents were prepared. Moreover, when the defendants raised the issue, the Government was unable or unwilling to provide the answers. Even the Special Agent, in attempting to date the documents, stated on at least one occasion that the likely date of preparation related to the date typed on the face of the interview memorandum: in dating Exhibit 12, the Russell memorandum, the agent noted that he believed the date of preparation was "prior to June of '83 *and it is dated February 23, '83*." (emphasis supplied) The Court therefore rejects the Government's position. The reasonable assumption from the face of the document would be that it had been prepared at roughly the time stated on it.

The Special Agent's untrue testimony was not limited to document production issues. He gave such testimony relating to his diary. The Omni defendants asked the agent whether he kept a daily log or diary of his activities; the defendants were attempting to discover when the documents actually were created. The agent testified that his diaries contained only the number of hours that he worked in a day and did not indicate the substance of his activities. When the Court ultimately ordered relevant portions of the 1983 and 1984 diaries produced, it became clear that this testimony was untrue. The diaries, although sketchy, often indicate that the agent prepared for certain critical meetings, and generated certain interview memoranda at issue in these hearings on particular days.

The other IRS employee who testified at great length during the hearings, and did so falsely or wrongly on many occasions, was the Revenue Agent involved in the case. As was the case with the Special Agent, this witness also had difficulty dating accurately when memoranda were prepared. The Revenue Agent's false testimony extended beyond dating the production of documents, however. One fact issue which arose during the hearings concerned a line in the agent's handwritten notes of the November 22, 1983 interview of Sandra Poe Wilkins. That line stated: "Not discuss contents, atty/client priv." This sentence, if taken to be true, would demonstrate government sensitivity to the privilege.

Defense counsel asked the Revenue Agent as he testified for the first time when this sentence was written. The agent testified adamantly that his notes followed the course of the interview exactly, and that he therefore wrote down the statement as it was spoken. This testimony was clear and unequivocal. It remained unshaken under intense examination by defense counsel. In fact, this testimony was false, and the agent later returned to the witness stand to recant it.

Disturbing, conflicting testimony was also presented. With regard to Exhibit 5, one of the interview memoranda involving William Green, different IRS agents took responsibility for the document's alteration from a preexisting memorandum. The Revenue Agent testified forcefully, during two different appearances, that he alone made the changes without any input or consultation with any other person. According to this version, the changes were made in the Spring of 1984, before the defense motion to dismiss was filed. A different agent testified forcefully that he alone made the changes. This agent testified that the changes were made prior to October 1, 1983. In fact, the Revenue Agent made the changes with assistance from the Special Agent between May 8, 1984 and May 18, 1984.

The AUSA who directed the entire investigation and presented the case to the grand jury also gave incorrect testimony. For instance, defense counsel asked about the date of preparation of the November 22, 1983 Wilkins interview memorandum (Defendants' Exhibit 8). The AUSA stated on many occasions that it was prepared soon after the interview; in fact, it was not prepared until May, 1984. Another example of untrue testimony given by the AUSA concerned the use made of the Wilkins interviews in the decision to indict Bornstein. The AUSA testified on repeated occasions that Wilkins' potential testimony was put out of mind, was not presented to the grand jury, and was not part of the decision-making process. However, evidence in the record shows that the AUSA did consider the substance of statements allegedly made by Wilkins against Bornstein.

Perhaps the most flagrant, troubling aspect of the entire tax investigation occurred when the Government interviewed Sandra Poe Wilkins, Bornstein's secretary. The Government contends that there is no impediment, legal, technical, ethical, or otherwise, to an unannounced, uncounselled, surprise interview of a lawyer's secretary when the focus of the interview will be on what the secretary knows about the relationship between the lawyer and his client. Unlike lawyers, who can protect the attorney-client privilege, secretaries have no legal training and cannot be expected to make sophisticated judgments regarding the scope of the privilege. This Court is shocked and offended by such a procedure and condemns this investigatory tactic, especially in the factual situation presented here.

As has already been described in great detail, Omni asserted the attorney-client privilege before Judge Young. On November 8, 1983, Judge Young held that invoices sent by Bornstein to Omni were privileged. Although fully cognizant of this ruling, the Special Agent and the Revenue Agent travelled two weeks later to Wilkins' home for an interview. The AUSA knew such an interview was to occur. The interview also followed by only two business days the conference with Bornstein's attorneys, who had forcefully stated that the case against Bornstein was fatally flawed because the Government lacked a witness. The purpose of the meeting with Wilkins was clearly to find such a witness. In light of this purpose, the proper course of action would have been to subpoena Wilkins before the grand jury and allow Omni an opportunity to intervene.

The Special Agent testified that Wilkins was only interviewed because she was a "loose end", "for no particular reason", and as part of "unfinished business." This testimony was certainly misleading and probably false. Even the agent's diary reflects that he spent twelve hours on the day preceding the interview preparing for it.

Subsequent to the interview of Wilkins, the agents prepared a memorandum which purported to summarize statements made by Wilkins. As has already been detailed, the Revenue Agent added at least one line to his notes at a later point in time, to wit: "Not discuss contents, atty/client priv." At the evidentiary hearing Wilkins testified that the contents of the memorandum read like a novel to her and were largely false. Only at the hearing did it emerge that the agents had related certain facts to Wilkins which, according to the agents, Wilkins confirmed and, according to Wilkins, she denied. In either event the memorandum makes it appear as if Wilkins made certain statements, which she did not.

The most damaging episode to Bornstein related in the memorandum consisted of statements to the effect that Wilkins had corroborated the allegation about the safe deposit box. According to the memorandum, Wilkins stated that Bornstein had a safe deposit box which held United Aviation Services documents. The documents purportedly demonstrated that Bornstein had properly advised his clients and that the clients ignored the advice. Paragraph 17 of Exhibit 8 states that if Omni "ever tried to pin anything on him [Bornstein], he had proof that he advised them the correct way to do it and they didn't." Wilkins denied these statements at the hearing. She testified that the only document known to her in Bornstein's safe deposit box was his will.

The significance of the memorandum is that it is not entirely and fully accurate. At the time, however, Bornstein's counsel did not know the true situation; they were unable to speak with Wilkins and they did not receive a copy of the memorandum.

Another issue that arose concerned who delivered a copy of the earlier version of the Wilkins November 22, 1983 interview memorandum to Mark Friend, the Department of Justice Tax Division attorney who reviewed the case. Friend testified that the document was brought to him at his office in Washington, D.C. by the Special Agent, Revenue Agent, or AUSA, or some combination thereof. None of the three witnesses admitted to delivering the document during their extended testimony; all three denied doing so. Someone clearly gave the document to Friend, however, and it would appear that at least one of the witnesses testified falsely in that regard. When the memorandum was delivered, the person who delivered it made a comment to the effect that "this was really good stuff, it was really dynamite." From this statement, the Court finds that it appears most likely that the Special Agent delivered the memorandum. But it is not necessary to conclusively determine who actually delivered the item. The crucial fact is that there was, once again, false testimony.

On the basis of this continuous stream of incorrect, misleading, and false testimony, the Omni defendants charge that the three individuals committed perjury and obstructed justice. It is neither the role nor the function of this fact-finder in the context of a pretrial motions hearing to make findings of criminal conduct. Throughout the lengthy proceedings the Government has focused its attention on the alleged breaches of the attorney-client privilege, and not on allegations of perjury and obstruction of justice. The Government has not "defended" the Special Agent, Revenue Agent, or AUSA against these charges; these three persons are not on trial for the alleged crimes in any case. Clearly it would be imprudent for this Court to draw the conclusions requested by defendants.

It would also be unnecessary to do so. The motive involved in this case is irrelevant to the Court's disposition of the matter. The critical fact is that there was a considerable amount of false, wrong testimony. At issue here are not merely a few, isolated incidents that can be shrugged aside due to the passage of time and length of the hearings. The Court can easily understand innocent misrecollection. But the effect of this testimony and the obvious prejudice which resulted cannot be so easily dismissed. It will be evaluated *infra* in section III of this opinion.

Having reached these conclusions, the Court does express its view that the AUSA did not commit perjury and did not obstruct justice. The Court is left with a sufficient reasonable doubt on these criminal questions, even without a defense being mounted on behalf of the AUSA. The Court is satisfied that the AUSA had become so immersed in the prosecutorial role and so protective of the Government's handwritten interview notes that it was impossible for the AUSA to give proper attention to the enormity of what was being done. Testimony given by the AUSA certainly was untrue and wrong in certain places. However the criminal intent required by law has not been proven. The Court further notes that it makes no findings at all with regard to the criminality of testimony given and conduct undertaken by the Special Agent and the Revenue Agent.

C. Lack of Candor

The third area of the Court's concern may be described as lack of candor. It is clear beyond any doubt that misrepresentations were made to the Court, from the beginning of the evidentiary hearing. Misrepresentations occurred in colloquies with the Court and in testimony by witnesses. The Court recognizes that events about which certain witnesses testified often occurred several years prior to the hearing. Nonetheless there was virtually a wholesale failure of recall of critical events by the relevant Government witnesses, and no such failure by the defendants' witnesses. At the least this failure constitutes a lack of candor. The primary (but not sole) offender is the AUSA.

At the outset of the hearing on June 11, 1984, extensive discussion concerned whether the agents' handwritten notes should be produced to the defendants. On June 11th, the AUSA argued that the Government's motion to quash the Omni defendants' subpoenae should be granted because all memoranda had been produced and there was no need to obtain the handwritten notes. The AUSA did proffer the notes to the Court for *in camera* inspection. However, the AUSA did not inform the Court at that point that all memoranda had been prepared or altered within six weeks of the hearing. Nor was the Court informed that there were preexisting versions of some altered memoranda in the files. If the Court had been so informed, it undoubtedly would have ordered the immediate production of the underlying documentation. Instead, the Court reviewed the handwritten notes in camera that evening. On June 12, 1984, the Omni defendants called two witnesses to demonstrate the need for an evidentiary hearing. These witnesses addressed the typewritten memoranda pertaining to interviews to which they had been either a party or a witness, and they basically testified that the memoranda were false, misleading, and incomplete.

A crucial colloquy which evinces lack of candor began between the Court and the AUSA after the witnesses testified and the defendants renewed their request for handwritten notes:

> THE COURT: Clarify for me, . . . if you will, first of all, under what circumstances did the Government give the typewritten statements to the Defendants? Was this in response to some Motion? Was it totally voluntary? Did you take the position that you didn't have to produce them but nevertheless were going to voluntarily? What were the circumstances under which they were turned over?

The AUSA responded that the purpose of the hearings was to give the defendants an opportunity to show that the privilege was breached:

> AUSA: We realized that they could not make a factual showing . . . unless they had the actual statements that were made. Accordingly, we provided the memoranda which we believed were -- which there couldn't be any questions that might have mentioned attorney/client dealings so that they could then make a factual showing to the Court. . . . But we provided the memoranda to them to enable them to prepare themselves for the hearings yesterday and today.

In this statement the AUSA did not indicate that the memoranda were given to the defendants precisely in response to the motion to dismiss or that all the memoranda had then been created or altered. The Court then naively asked a second question which addressed what became the critical issue concerning the preparation of the documents:

> THE COURT: Well, now is there significance in themselves to the fact that they are typed, if one of these would have been handwritten, would you all have taken the position that was not producible?

A candid answer would have fully apprised the Court of the activities that had recently been undertaken. The AUSA, however, gave a totally nonresponsive answer to the inquiry:

> AUSA: Your Honor, it is a matter of practice within the Government, I assume, that the notes are taken, contemporaneous notes are taken by the agents as well as from time to time by the attorneys in the case during the course of an interview. And, then memoranda are prepared. These memoranda, I guess, are similar, if you are dealing with the Federal Bureau of Investigation, to the FBI 302's, with respect to the DEA they would be the DEA 6's. Underlying all those documents I think Your Honor is aware are the handwritten notes of the agents from which the documents were prepared and I believe the law in the Fourth Circuit is that those notes do not have to be produced, that the memoranda are what is --
>
> THE COURT: Well, what I am asking you, what if under certain circumstances the government agent does not reduce it to a typewritten report, then would the government take the position because it was never typed up the handwritten one is not producible?
>
> AUSA: No, Your Honor, we would provide the other side with whatever was the official document reflecting that particular interview. . . .

In this colloquy the AUSA failed to inform the Court that the Government had, in fact, been producing typewritten memoranda exactly because none had been prepared. The AUSA also failed to indicate that changes in preexisting reports had been made.

Later in oral argument on the issue of the production of the notes, the Court directed its attention to the Candler memorandum (Defendants' Exhibit 35). Testimony earlier on June 12, 1984 had revealed that certain conversations between the agents and Candler were omitted from the memorandum. The Court went so far as to ask:

> THE COURT: Now I am at a loss to understand, unless these papers were prepared solely on the issue of attorney/client privilege, which I am confident is not the fact, how did the conversation get omitted?

The AUSA again failed to correct the obvious assumption made by the Court which was certainly in error, as the AUSA knew; the papers referred to had in fact been prepared solely in response to the attorney-client privilege motion.

The AUSA's failure to be fully candid could have had tragic consequences. The Court was faced with the issue of whether or not to permit an evidentiary hearing. If the Court had blindly relied on the AUSA's representations, no hearing would have been held.

Later in the same day the Special Agent took the witness stand and began his testimony. The Omni defendants immediately focused on the dates of preparation of the typewritten memoranda, item by item. The Special Agent testified either falsely or incompletely, as described earlier. Approximately forty-five minutes into the questioning, the AUSA made the following representation:

> AUSA: Your Honor, as far as the Government is concerned, when this dispute was raised as far as the attorney-client privilege was concerned and we felt obligated to provide information to the other side so that they could be prepared for the hearings today, I did, in fact, ask the agents to change their original notes into memoranda so to the extent that it came from me and I knew the Motion had been filed, that is certainly true, and it didn't reflect on the agents at all, it reflects on me as opposed to them that we knew the material had to be turned over and we had to put it into typewritten form rather than handwritten notes.
>
> MR. SIMON: That answers the Court's question earlier if these were prepared in connection with the Motion. Possibly we could find out which of the memoranda were in fact prepared on that basis.
>
> AUSA: That may not be true for all of them. I told the agents to go through their notes and see who that applied to with respect to attorney-client and to the extent there weren't memoranda prepared they were prepared and produced to the other side.

This representation by the AUSA, along with the exchange with defense counsel, is significant to the Court in several respects. First, it shows that the AUSA was not fully candid in the earlier statements to the Court that if no memoranda existed the notes would have been produced. Secondly, it showed that the AUSA was involved directly in the creation and alteration of the documents. Thirdly, the representation along with the qualification finally made by the AUSA left the issue murky; even when the AUSA finally addressed the matter, there was not a full response to the issues.

The Government has consistently relied on these representations by the AUSA for the proposition that the record had then been made clear and the defendants then possessed all the knowledge relevant to the legal issues. Under examination it is clear that the statements in themselves are neither complete nor candid. The defendants sought to know exactly when documents were created and altered and by whom. At the time that these questions were originally posed, no one but the Government knew the answers. And, the Government throughout the hearings never gave the answers. The facts were made available to the Court only through extensive investigation on behalf of defendants and many days of hearings.

Without belaboring the lack of candor exhibited by several Government witnesses during the hearing, the Court does wish to note that the AUSA was not candid during portions of testimony given from the witness stand. The AUSA testified that there was never a possibility at the Department of Justice that the prosecution would be declined. This testimony was incorrect. Friend testified that not only did such a possibility exist but that he so informed the AUSA on December 15, 1983.

However significant the lack of candor with the Court may appear in this one interchange, the AUSA was less than candid in another, perhaps more signficant way. One of the primary issues in the hearings involved the process by which Bornstein made his proffer to the Government, which has been discussed above. During these hearings Bornstein's former counsel testified credibly about the procedure. Bornstein became interested in making a proffer only after the Government reported that Sandra Poe Wilkins had given statements which were damaging to him.

In attempting to convince the courts that a proffer ought to proceed, the Government maintained that Bornstein sought the opportunity to make a proffer and that the Government, in the interests of treating all potential defendants fairly, wished to give Bornstein that opportunity. In its answer to the motion to dismiss, the Government implied that Bornstein virtually begged the Government for this option. The facts concerning the proffer are much more complex. For quite some time the Special Agent wanted to hear what Bornstein might want to say. Prior to the meeting of December 15, 1983, the AUSA clearly had always wanted to talk to Bornstein, because he was the return preparer. The Government was willing to make any efforts necessary because, according to the AUSA, "[we] had to talk to him if we in any way could."

The desire to talk to Bornstein only intensified after the conference at the Department of Justice. Bornstein's counsel raised issues that troubled Friend, the attorney at the Justice Department. Bornstein's counsel also hammered home the point on November 18, 1983, that the Government lacked a witness against their client. Both the AUSA and the Special Agent were frustrated in dealing indirectly with Bornstein's attorneys instead of directly with Bornstein himself. On December 15th, prior to the meeting with Bornstein's counsel, the AUSA had a discussion with Friend. According to Friend's notes of that conversation, the AUSA "is trying to figure a way to get testimony from Bornstein, . . . agree[ing] that we must know what he will say." At the December 15, 1983 meeting, the Special Agent on two occasions and the

AUSA at one point both suggested the viability of a direct discussion between Bornstein and the Government.

Unlike the AUSA who refused or declined to relate candidly the Government's approach towards Bornstein, the government investigator assigned to the United States Attorney's Office stated that "the key is Bornstein, if he flips and tells the truth, they're all dead, we plead this thing out, that kind of thing." If Bornstein did "flip", "it would be a cakewalk for the rest of the case."

The Special Agent, Revenue Agent, and especially the AUSA were less than candid in relating the proffer procedure and the Government's actual motive for the proffer. This Court does not condemn the Government's motive; it does, however, take issue with the manner in which the real motive was obfuscated before Judge Young, the Fourth Circuit, and this Court. True candor would have at least revealed the Government's mixed motives, as described above. The Court notes that none of the three Government representatives recalled the momentous meeting of November 18, 1983, at which time Bornstein's attorneys gave a replay of the Justice Department conference, at the specific request and for the benefit of the agents. The AUSA had virtually no recall of this meeting, beyond "being in the room." The Special Agent recalled nothing about a "replay" or of a meeting with Peffer in November, 1983, even though his diaries reflect that he spent thirty hours in preparation for the November 18th meeting on the three days prior to that meeting. The Revenue Agent also had no recollection of the meeting. This is particularly surprising because the tone of the meeting was acrimonious and heated, with voices raised and with some of the participants pounding on the conference table.

None of the three recalled the December 15, 1983 meeting, the purpose of which was to debrief Bornstein's attorneys on the statements allegedly made by Wilkins. The Special Agent could not recall the purpose of the meeting, nor of a meeting at which time the Wilkins memoranda was to be discussed. The Special Agent also stated he had no recollection of saying that he wanted to speak directly with Bornstein. The Revenue Agent purported to recall nothing of the meeting; he, however, did at least recall a statement that the Special Agent "would like to question Mr. Bornstein personally." The sum of the AUSA's testimony was lack of recollection at all.

The lapse of memory disappoints the Court and evidences a lack of candor by these three witnesses. Confirmation of these meetings and the events transpiring within was made by Bornstein's attorneys and the investigator in the United States Attorney's Office.

## III. Sanctions

Having set forth at length the three principal areas of concern to the Court that occurred during the course of the hearings, namely the alteration and creation of documents, false and incorrect testimony, and a lack of candor in colloquies with and testimony before the Court, the question becomes what sanction, if any, is appropriate. The Omni defendants request, in the alternative, dismissal of the indictment, disqualification of government prosecutors and investigators, and suppression of evidence. Each sanction will now be treated separately.

A. *Dismissal*

The issue of dismissal of the indictment is not an easy one. Federal courts have a general supervisory power with respect to the administration of justice in federal judicial proceedings. *See United States v. Hasting*, 461 U.S. 499, 505 (1983); *United States v. Payner*, 447 U.S. 727, 734 - 36, 735 n.8, *reh'g denied*, 448 U.S. 911 (1980); *McNabb v. United States*, 318 U.S. 332, *reh'g denied*, 319 U.S. 784 (1943); *see generally* Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433 (1984). The use of the supervisory power supports three institutional goals: deterring illegal conduct by government officials, protecting and preserving the integrity of the judicial process, and implementing a remedy for violation of recognized rights. *See United States v. Hasting*, 461 U.S. at 505; *United States v. Payner*, 447 U.S. at 735 n.8; Note, *The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment--A Basis for Curbing Prosecutorial Misconduct*, 45 Ohio St. L. J. 1077, 1084 (1984). Within limits, federal courts may formulate procedural rules not specifically required by the Constitution or the Congress. *United States v. Hasting*, 461 U.S. at 505.

Courts have dismissed criminal prosecutions because of serious government abuse in the investigation leading to the indictment. See United States v. Kilpatrick, 594 F. Supp. 1324, 1352-53 (D. Col. 1984); United States v. Lawson, 502 F. Supp. 158, 170 (D. Md. 1980); United States v. Dahlstrum, 493 F. Supp. 966, 974-75 (C.D. Cal. 1980), appeal dismissed, 655 F.2d 971 (9th Cir. 1981), cert. denied, 455 U.S. 928 (1982). Moreover, courts have dismissed indictments because of serious government misconduct following the indictment. See United States v. Pollock, 417 F. Supp. 1332, 1348-49 (D. Mass. 1976); United States v. DeMarco, 407 F. Supp. 107, 115 (C.D. Cal. 1975); United States v. Banks, 383 F. Supp. 389, 397 (D.S.D. 1974), appeal dismissed sub nom. United States v. Means, 513 F.2d 1329 (8th Cir. 1975).

If the defendants demonstrate actual prejudice, the indictment can be dismissed under the supervisory power. See, e.g., United States v. McKenzie, 678 F.2d 629, 631 (5th Cir.), reh'g denied, 685 F.2d 1386 (5th Cir.), cert. denied, 459 U.S. 1038 (1982); United States v. Hembhard, 676 F.2d 193, 200 (6th Cir. 1982). Yet the defendants maintain that no showing of harm to them is required to justify dismissal pursuant to the supervisory power. The Government argues by contrast that actual prejudice must be shown, because even where violations of constitutional rights are at issue dismissal is inappropriate absent demonstrable prejudice to defendants.

The courts have not definitively resolved whether an indictment can be dismissed pursuant to the supervisory power absent prejudice to the defendant. The Supreme Court has not squarely addressed the issue. However, the Court made clear in *United States v. Morrison*, 449 U.S. 361, *reh'g denied*, 450 U.S. 960 (1981), that dismissal of an indictment is inappropriate under the sixth amendment even if the violation is deliberate, absent demonstrable prejudice or a substantial threat thereof. The recent pronouncements of the Court in *Payner* and *Hasting* imply a more limited use of the supervisory power, possibly including a requirement of actual prejudice for dismissal. *See* *United States v. Lehr*, 562 F. Supp. 366, 371 (E.D. Pa. 1983), *aff'd without opinion*, 727 F.2d 1100 (3d Cir. 1984). These decisions, however, leave intact the well-settled proposition that the supervisory power still exists for "truly extreme cases." *United States v. Broward*, 594 F.2d 345, 351 (2d Cir.), *cert. denied*, 442 U.S. 941 (1979).

A review of circuit court decisions shows disarray on the requirement of prejudice, with the full significance of the *Payner* and *Hasting* rulings not yet evaluated. The Fourth Circuit has yet to speak on the question. The decision by the Ninth Circuit in *United States v. Rogers*, 751 F.2d 1074, 1077 - 79 (9th Cir. 1985), is representative of those circuits which suggest that prejudice must be shown: *United States v. Acosta*, 526 F.2d 670, 674 (5th Cir.), *cert. denied*, 426 U.S. 920 (1976); *United States v. McKenzie*, 678 F.2d 629; *United States v. Crow Dog*, 532 F.2d 1182, 1196 - 97 (8th Cir. 1976), *cert. denied*, 430 U.S. 929 (1977); *United States v. Brown*, 602 F.2d 1073, 1076 - 77 (2d Cir.), *cert. denied*, 444 U.S. 952 (1979). A contrary line of authority exists. The following courts have concluded that an indictment can be dismissed in the absence of prejudice, in extreme circumstances. *See, e.g., United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979); *United States v. McCord*, 509 F.2d 334, 349 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 930 (1975). The Eleventh Circuit has not yet determined whether prejudice is required. *See United States v. Pabian*, 704 F.2d 1533, 1540 (11th Cir. 1983).

In resolving the obvious divergence among the authorities, a few salient points emerge. The supervisory power may be invoked in a myriad of situations based on the peculiar circumstances presented. It should be exercised sparingly and only on a showing of demonstrated and longstanding prosecutorial misconduct, *see United States v. Adamo*, 742 F.2d 927, 942 (6th Cir. 1984), *cert. denied sub nom. Freemah v. United States*, ___ U.S. ___, 105 S.Ct. 971 (1985), just as reversals of convictions under the supervisory power must be approached "with some caution." *United States v. Hasting*, 461 U.S. at 506 - 07. *See also United States v. Artuso*, 618 F.2d 192, 196 - 97 (2d Cir.), *cert. denied* 449 U.S. 861, 449 U.S. 879 (1980); *United States v. Fields*, 592 F.2d 638, 648 (2d Cir. 1978), *cert. denied*, 442 U.S. 917 (1979). Sparing use, of course, does not mean no use. Even "disfavored remedies", *United States v. Rogers*, 751 F.2d at 1076 - 77, must be used in certain situations. Exercising the inherent authority is most appropriate in particular fact situations that do not lend themselves to rules of general application. *United States v.*

*Harrison*, 716 F.2d 1050, 1053 n.1 (4th Cir. 1983), *cert. denied sub nom. Wissler v. United States*, 466 U.S. 972 (1984).

A common thread underlying many decisions is that the magnitude of the misconduct affects the use of the supervisory power, whether or not actual prejudice is shown. *See, e.g., United States v. Serubo*, 604 F.2d at 818 (prosecutorial conduct extreme; graphic and misleading reference by prosecution to Cosa Nostra hatchet men); *United States v. Hogan*, 712 F.2d 757 (2d Cir. 1983) (misconduct flagrant); *United States v. Fischbach & Moore, Inc.*, 576 F. Supp. 1384, 1396 (W.D. Pa. 1983) (isolated incident of misconduct). In determining the proper remedy pursuant to the supervisory power, the relief chosen should be directly related to the seriousness of the misconduct. *United States v. Banks*, 383 F. Supp. at 392. Repeated instances of deliberate and flagrant misconduct justify dismissal of the indictment. *See id.*; *United States v. Hogan*, 712 F.2d at 761; *United States v. Kilpatrick*, 594 F. Supp. at 1352 - 53; *United States v. Lawson*, 502 F. Supp. at 172.

Exhaustive research reveals no case in which Government personnel committed repeated misconduct in so many forms as has occurred here, at the preindictment stage, the discovery stage, and in hearings before this Court. In light of the Supreme Court's general statements concerning the purpose for which the supervisory power was created and that Court's sensitivity to the need to invoke the doctrine to promote fairness and assure justice, the supervisory power must be utilized in this case. Court decisions emphasize the unifying premise in all of the supervisory power cases -- that although the doctrine operates to vindicate a defendant's rights in an individual case, it is designed and invoked primarily to preserve the integrity of the judicial system. United States v. Leslie, 759 F.2d at 372. The Court has particularly stressed the need to use the supervisory power to prevent the federal courts "from becoming accomplices to such misconduct." United States v. Payner, 447 U.S. at 744 (Marshall, J., dissenting). Utilization of the supervisory power remains a harsh ultimate sanction, but must be used for "conduct that shocks the conscience." United States v. Baskes, 433 F. Supp. 799, 806 (N.D. Ill. 1977) (quoting Rochin v. California, 342 U.S. 165, 172 (1952)).

Factually, the misconduct here is not isolated, but longstanding. Indeed untrue testimony and a lack of candor permeated the entire ten-month hearing. The Government did not proffer the truth about the creation and alteration of the documents during all that time. The misconduct here is as extreme as any found in the reported decisions reviewed by this Court. Defendants and the Court clearly suffered prejudice from the misconduct. Whether or not there is prejudice, the supervisory power to have any significance must be applicable to cases of repeated, flagrant governmental misconduct. In light of all the testimony adduced at the evidentiary hearing, it is clear that this case rises to the high threshold imposed for invocation of the supervisory power. The Court condemns the manner in which the Government proceeded, and cannot now stand idly by, implicitly joining the federal judiciary into such unbecoming conduct.

As reviewed in detail above, the Court is deeply troubled by the manner in which the Government handled the submission of documents to defense counsel and the Court, and in the evidentiary hearing before the Court. It simply is wrong for Government personnel to act as they have done here. This type of conduct cannot and must not be condoned; in fact, it must be strongly condemned. The Court has not set forth the details of the prosecutorial abuses lightly and without regard to the individuals involved.

When oral argument on the motion was held on June 25, 1985, the Government did concede that it was wrong to prepare memoranda as had been done. But the Government recommends almost a "harmless error" approach as a sanction for this egregious error, contending that no harsh remedy should follow because all underlying documents were finally produced to the defendants.

The Court rejects this notion. Absolutely no justification exists for revising documents that are being turned over to an adversary in litigation once the issue has been raised, particularly without notice of revision to the opposition. The Government offers no excuse, other than to maintain that the changes were made for the sake of accuracy. However, the unrevised documents were apparently sufficient for review by the Department of Justice as it decided whether or not to approve the prosecution. The only possible conclusion that the Court can reach is that changes were made to strengthen the Government's position at the hearing, even though the effect of the alterations was minimal. Similarly, there is no justification for creating documents during this time period, without indicating so, no matter what the motive.

The Government's argument overlooks one critical consequence that would have resulted if the Government's representations and the documents had been accepted at face value: there would have been no hearing, and the truth would have never been known. As tragic as are the events which transpired during the evidentiary hearing, it would have been even worse for the Court to have denied the defendants a hearing. The fact that all the relevant documents were finally produced only occurred because of the Omni defendants' strenuous efforts.

It is neither reasonable nor proper to change, alter, correct, modify, or create documents once a matter is in litigation, especially absent notice to opposing counsel. This rule must apply equally to the Government as it does to defendants. The rule applies irrespective of alleged good faith.

The Court is equally troubled by the consistent pattern of false testimony and lack of candor exhibited by various Government representatives who played prominent roles in this tax investigation. The details have already been recounted. This Court has considered carefully the large volume of disturbing testimony on a whole range of issues.

The Court finally is extremely disturbed by the Government's cavalier attitude with regard to a surprise interview of an attorney's secretary, when the purpose of the interview will be to discover communications between the attorney and his clients. If no legal precedent presently exists in reported cases to proscribe such outrageous conduct, one needs to be added at this time. This investigatory tactic is patently improper. A grand jury appearance would be a preferable approach; in any event, before such an interview is conducted, court approval should at least be obtained.

The case closest to this issue is United States v. Valencia, 541 F.2d 618 (6th Cir. 1976). In Valencia, a lawyer's secretary was also a paid government informant. The secretary had been present when various narcotics transactions occurred; she had also been instructed by her employer to take notes during that time for the purpose of defending one of the clients on smuggling charges. At trial, the secretary testified. After learning that the secretary had become a paid government informant during the investigation, the district judge dismissed the indictment as to four of the defendants, including the attorney. The basis for dismissal was the outrageous governmental intrusion into the attorney-client privilege. On appeal, this determination was affirmed: "We agree with the district court that it was improper for the government to have intruded into an attorney-client relationship by paying an attorney's secretary for information about his clients." Id. at 623. This was true even though the attorney was directly involved in a criminal conspiracy with his clients, because "the law in its majesty . . . [cannot] be equally slimy." Id. at 621 (quoting the District Judge).

The Court finds the Government's intrusion in the Omni investigation equally intolerable. This is not a situation in which a secretary cooperates with the Government in an investigation and informs the attorneys and clients involved to proceed accordingly at their own peril. See United States v. King, 536 F. Supp. 253 (C.D. Cal. 1982). Valencia also stands for the proposition that the secretary's testimony, when so obtained, cannot be admitted at trial. It follows that the testimony of Wilkins would be inadmissible at any trial involving Bornstein or his clients.

Thus, in exercising the supervisory power entrusted to it to ensure the smooth and proper administration of justice, the Court has determined that the indictment should be dismissed. Twenty-eight days of hearings produced example after example of conduct unbecoming to the Government. Innocent misrecollection by witnesses is a common occurrence and is excusable, but the cumulative effect of the evidence presented here adds up to more than innocent misrecollection. Defendants should not be forced to conduct lengthy hearings to learn the basic essential facts needed as a predicate to a pretrial motion. Courts should not be forced to question whether government witnesses are testifying truthfully and fully. The Government's conduct was patently egregious and cannot be tolerated or condoned. Its manner of proceeding shocks the Court's conscience. The indictment must be dismissed as a prophylactic sanction for the consistent course of entrenched and flagrant misconduct. United States v. Birdman, 602 F.2d 547, 559 (3d Cir. 1979), cert. denied, 444 U.S. 1032, 445 U.S. 906 (1980).

However, the Court does not take lightly the fact that an impartial grand jury indicted these five defendants on serious criminal tax charges. This grand jury was completely untainted by and ignorant of the matters of significance to the Court. Therefore, the indictment will be dismissed without prejudice. Although defendants have certain rights which have been violated here, they have no concomitant right to bar forever investigation into their alleged criminal conduct. *United States v. Lawson*, 502 F. Supp. at 172. The Court recognizes that the passage of time may have caused the statute of limitations to run as to certain tax years charged in the Indictment. This fact does not affect the decision to dismiss the Indictment without prejudice.

### B. Disqualification

In the event that the Government decides to seek another indictment in this matter, an issue undoubtedly will arise about whether any of the Government prosecutors or investigators should be disqualified. Based on the misconduct described in detail throughout the opinion, this Court has determined that the Special Agent, the Revenue Agent, and the AUSA involved in this litigation must not participate further in the prosecution of the case.

### C. Suppression

The last sanction requested in the Omni defendants' initial motion relates to the suppression of evidence. Had it not dismissed the indictment, the Court might have concern over what evidence ought to be suppressed. In light of the Court's disposition, the issues are greatly simplified, and will need to be addressed only in the event of reindictment.

The Dornstein proffer need not be suppressed because its use has already been limited by rulings of Judge Young and the Fourth Circuit. Statements made by Sandra Poe Wilkins need not be suppressed here; although the Court condemns the investigatory technique utilized to obtain the interview of Wilkins, her testimony during the hearings demonstrated clearly that the Government will be unable to use her as a trial witness. If Wilkins should be proffered as a witness at a future trial, the full ramifications of United States v. Valencia, 541 F.2d 618 (6th Cir. 1976), can be explored. All other issues relating to the suppression of evidence based on violations of the attorney-client privilege can be raised during a future trial, if then appropriate.

The Court will enter a formal order dismissing the indictment without prejudice.

Walter E. Black, Jr.
Walter E. Black, Jr.
United States District Judge

Date: May 15, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA :

v. :

OMNI INTERNATIONAL : CRIMINAL NO. B-84-00101
CORPORATION (formerly known as
Omni Investment Corporation), :
WAYNE J. HILMER,
EVAN T. BARNETT, :
THOMAS A. WESTRICK, JR., and
JOSEPH P. BORNSTEIN :

## ORDER

For the reasons set forth in the foregoing opinion, IT IS, this 15th day of May, 1986, ORDERED as follows:

1. That the Motion to Dismiss the Indictment, Disqualify Government Counsel and Investigators, and Suppress Evidence Based on Violations of the Attorney-Client Privilege (Defendants' Joint Pretrial Motion Number 3) (Paper 20), filed on behalf of defendants, Omni International Corporation, Wayne J. Hilmer, Evan T. Barnett, and Thomas A. Westrick, Jr. -- being treated as a motion to dismiss indictment -- BE, and the same hereby IS, GRANTED, and the indictment in this case as to said defendants BE, and the same hereby IS, DISMISSED without prejudice.

2. That the Motion of Defendant Joseph P. Bornstein to Dismiss the Indictment on Grounds of Abuse of the Grand Jury Process and Governmental Misconduct, and seeking alternate relief (Bornstein Motion Number 4) (Paper 45) -- being treated as a motion to dismiss indictment -- BE, and the same hereby IS, GRANTED, and the indictment in this case as to said defendant BE, and the same hereby IS, DISMISSED without prejudice.

Criminal No. B-84-00101

3. That copies of the foregoing opinion and this Order are being transmitted to counsel of record for the parties to this action.

Walter E. Black, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA :

v. CRIMINAL NO. B-84-00101
:

OMNI INTERNATIONAL
CORPORATION (formerly known as
Omni Investment Corporation), :
WAYNE J. HILMER,
EVAN T. BARNETT,
THOMAS A. WESTRICK, JR., and :
JOSEPH P. BORNSTEIN

## ORDER

Since April 27, 1984, the defendants herein have filed numerous motions which have not yet been scheduled for hearing, pending the Court's ruling on the Motion to Dismiss the Indictment Disqualify Government Counsel and Investigators, and Suppress Evidence Based on Violations of the Attorney-Client Privilege (Paper 20), filed on behalf of defendants, Omni International Corporation, Wayne J. Hilmer, Evan T. Barnett and Thomas A. Westrick, Jr., and the Motion of Defendant Joseph P. Bornstein to Dismiss the Indictment on Grounds of Abuse of the Grand Jury Process and Governmental Misconduct, and seeking alternate relief (Paper 45). By previous Orders of Court (see Paper 28 and Order entered immediately prior to this Order), the periods of time from April 13, 1984 to January 7, 1985 and from January 7, 1985 to June 25, 1985, have been determined to be excludable time within the meaning of the Specdy Trial Act, 18 U.S.C. § 3161. The time from June 25, 1985 to the date of this Order is also excludable under 18 U.S.C. § 3161(h)(1)(F) because of the pending motions.

Accordingly, IT IS, this 15th day of May, 1986, ORDERED that the period of time from June 25, 1985 to the date of this Order shall be excludable time within the meaning of the Speedy Trial Act, 18 U.S.C. § 3161(h)(1)(F).

Walter E. Black, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | Criminal No. B-84-001 |
| | ) | |
| OMNI INTERNATIONAL CORPORATION, et al., | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |

## ORDER

This matter having come before the Court upon the Motion of the Omni defendants, Omni International Corporation, Wayne J. Hilmer, Evan T. Barnett, and Thomas A. Westrick, Jr. for a determination that the period of time from January 7, 1985 up until June 25, 1985 shall be excludable time within the meaning of the Speedy Trial Act, 18 U.S.C. § 3161(h)(8)(A) (see Paper 135); defendant Joseph P. Bornstein having concurred ~~[illegible]~~, in his Statement (Paper 1
IT IS, this 15th day of May, 1986,

ORDERED, that the period of time from the original trial date of January 7, 1985 up until June 25, 1985, the date scheduled for oral argument on Defendants' Motion to Dismiss the Indictment, Disqualify Government Counsel and Investigators, and Suppress Evidence Based On Violations of the Attorney-Client Privilege (Defendants' Joint Pretrial Motion Number 3), shall be excludable time within the meaning of the Speedy Trial Act, 18 U.S.C. § 3161(h)(8)(A). The ends of justice outweigh the interest of the public and the defendants in a speedy trial for the reasons that: the Motion to Dismiss in this multi-defendant, multi-count conspiracy case is unusual and complex. Establishing the evidentiary basis for the Motion has necessitated almost thirty days of testimony and hearings, spanning nine months and generating approximately 5500 pages of transcript and several hundred exhibits; and a detailed review of the evidence was necessary for the parties to submit proposed findings of fact and conclusions of law relevant to this threshold and potentially dispositive pretrial Motion.

WALTER E. BLACK, JR.
United States District Judge

## STATEMENT OF HON. FRED M. WINNER, PARTNER, BAKER & HOSTETLER, DENVER, CO

Judge WINNER. Thank you, Senator. I was not asked to and I have not prepared any formal statement. I think I should explain how I stumbled into the *Kilpatrick* case.

I had announced that I thought it was time for me to leave the bench, and I was cleaning up matters. Judge Kane called and told me that he had a very simple little case to try, that he had disposed of 26 of the 27 counts, and would I mind handling a run-of-the-mill obstruction of justice case. And I said: No, not at all. That is all right, if you are sure it is simple.

Well, it didn't turn out that way. The case was prosecuted, as I mentioned in my opinion, by attorneys not part of the U.S. attorney's office in Colorado. I said in my opinion, and I wish to emphasize as much as I can, that the U.S. Attorney's Office in the District of Colorado did absolutely nothing, as to which I have any criticism whatsoever; but it is a practice of the Department of Justice—and I can understand it—that complex tax cases are to be prosecuted by the Tax Division of the Department of Justice. And indeed, that is why they handled this case.

But they threw in the one tag-end count, obstruction of justice, and all of the tax counts had been dismissed by Judge Kane. The case had its problems, but they were not overwhelming. I could live with them. And the case went on for several days with a given amount of bickering among the lawyers. The jury was obviously troubled, as was evidenced by a question they submitted during their deliberations.

The U.S. Supreme Court has cautioned about answering questions from the jury and not doing it without the defendant and counsel for both sides being present. So, I asked that we have a hearing in open court; we did have, and counsel for the Government was there, the defendant was there, and defense counsel were there. And to my amazement, we were able to agree upon an answer with which they all could live.

That answer was given to the jury and I then received a telephone call ordering me to tell the jury to quit deliberating because one of the other Government lawyers didn't like the answer. So, that is the way the case wound up.

As I say, the jury deliberated for a substantial period of time, and they convicted Mr. Kilpatrick of the obstruction of justice case. I had given a long look at a motion for a directed verdict, but I had concluded that there was no way that a directed verdict could be granted. There was one witness in the case who, if his testimony was believed, Mr. Kilpatrick was guilty; that particular witness was a two- or three- or four-time loser. I have forgotten which, but he had quite a record; but in any event, the jury believed him.

In the course of the posttrial hearings, defense counsel convinced me that I had made a mistake in one of the rulings on evidence during the trial. I had ruled out testimony concerning compulsions put on a witness because I thought they were not matters for the jury to consider but, later, I looked up a substantial amount of law on it and I found out that I was dead wrong, that that testimony should have been received because it went to the credibility of that witness.

I felt that it was a close case, and I granted the motion for a new trial. I at no time made any ruling on prosecutorial misconduct. The only thing I actually did in the case was to grant a motion for a new trial because of what I thought was error—well, it was committed by me, but I assure you it was invited by the prosecution. They sure didn't want that testimony blocked.

But anyway, I very much wanted to get on with the posttrial motions. I had written the opinion. I wrote it in San Francisco, where I was sitting looking out over the bay, dreaming about where I used to fly a blimp over the bay. Every time I would see a blimp, I would get homesick. I wrote the opinion. I came back, and we set the hearing.

It was obvious from the outset that Government counsel were essential witnesses. I asked at the start of the hearing: Gentlemen, under the Code of Professional Responsibility, do you think you should continue with this case as counsel when you are going to have to testify? And they told me that they had discussed the matter with higher-ups, and there was nothing wrong with it.

We started the hearing, and all of a sudden, there was a 180-degree turn. And they said: No; they had decided they could not conduct the hearing, that they were going to have to testify; and Mr. Charles Alexander came out to handle the case. I have had experience with Mr. Charles Alexander for many years. I deem him to be one of the finest lawyers I have ever met in my life. I deem him to be a real credit to the Department of the Justice and the Tax Division and to the bar. He is a fine gentleman, and nothing I say should in any way be thought to be directed to Mr. Alexander.

I wanted very much to hear the testimony of the lawyers concerning matters which allegedly took place before the grand jury. For one reason or another, although they were in Denver, they did not ever testify. I then wrote the opinion in which I granted the new trial and in which I said there was going to have to be further testimony but that I was leaving the bench and that I was going to get even with Judge Kane. So, I assigned the case back to Judge Kane for him to wind up. I made absolutely no findings as to prosecutorial misconduct. All I did was to say that there was a tremendous amount of smoke and that the time had come for someone to decide whether there was any fire.

Judge Kane commented on one thing in his opinion that troubled me deeply. I had said in the first instance that I wanted to review the grand jury transcripts, and there were two file drawers of transcripts; and I can't say that I studied them—I scanned them but I had ordered that all the grand jury transcripts be turned over to me.

And I then ordered that, because of the showing which had been made, all grand jury transcripts should be turned over to defense counsel, subject to some very severe limitations and restrictions. Judge Kane's opinion recites that, to his surprise, and certainly to mine, all grand jury transcripts were not turned over to me, nor were they turned over to defense counsel, and that the missing portions of the transcripts, he found to be "unusual," or some such word. I have never seen it; I don't know.

Judge Kane spent literally weeks on this matter, and he wrote that which I think is an extremely fine opinion; and he found sufficient prosecutorial misconduct that he ordered the indictment be dismissed. That matter is on appeal. Whether the tenth circuit will agree or disagree, I know not.

Following the Supreme Court's opinion in the *Mechanic* case—if I pronounce that correctly—I wouldn't bank a lot on the affirmance of the opinion.

Be that as it may, it has been mentioned here this morning that perhaps some things should be done. I discussed in my opinion, Judge Kane discussed in his opinion, this question of pocket immunity. I have seen press reports sneering at both of us for complaining about pocket immunity and saying that which I am sure is true, that it is used all the time and that we are just semi-insane for being concerned about it.

Judge McWilliams on the tenth circuit in the *Anderson* case, which Judge Kane decided, gave short shrift to Judge Kane's criticisms of pocket immunity. I don't think really it is a matter for judicial decision. I think it is a matter for legislative decision.

The Congress of the United States, in sections 6001 and 6002, have explained how immunity is to be given. It is my understanding that when those sections were adopted, they were adopted so that the legislative branch of the Government could have some information as to how many people were being given immunity and what they were being given immunity from.

There are very careful procedures spelled out. To put it in a nutshell, the judge's role in those procedures becomes ministerial. All he can do is to approve the request, but the request is very, very closely restricted. It must be made by the U.S. attorney, and it must be approved by the Assistant Attorney General or his designee, and it must be in writing. You must have the person who is getting immunity in the courtroom, and you must read him the grant of immunity so he will know precisely what immunity he is being given, and he is given immunity for everything except perjury.

The problem with the pocket immunity is, and what pocket immunity means is, that any assistant U.S. attorney at his whim, if a particular U.S. attorney permits it, can make a deal with defense counsel to grant immunity to his client.

Now, in the *Kilpatrick* case, there was a gentleman who testified that he had been granted immunity but that he testified—and I don't know whether this is true or not because I never heard from the other side—but he testified that he was told that if you testify for the defendant Kilpatrick, all bets are off. That is a great way to block off a defense witness.

That is one of the reasons why I have problems with pocket immunity. I don't think it is much good, but as I say, many, many lawyers laugh at us for worrying about it. To me, the only way immunity can be granted and have it absolutely effective is the way the statute says it should. If I have any suggestion at all of something which might be considered, it would be to put some sort of a penalty on the grant of immunity in any way other than a method provided by statute.

I think that the grant of immunity is a matter to be determined by the legislative branch. The Supreme Court has held that it surely is not anything to be determined by the judiciary. And I suggest that there should be a careful amendment to the present immunity statutes to try to spell out when immunity is to be granted. An inexperienced U.S. attorney in all good faith may well grant immunity to the person who is wearing the blackest of the black hats, and then he can convict the lessers.

It is something that I do not think should be permitted without a full formal record being made as to who is granted immunity and for what. I do want to say that, in my experience, this is certainly not the norm. I think that the U.S. Department of Justice and the U.S. Attorney's Office, with which I have had experience, do fine work. I certainly do not think that there should be any blanket criticism leveled at the Department of Justice or any of its divisions. I think they do good work. I am a great respecter of most—well, almost all—of the attorneys in the Department of Justice.

Once in a while, you have some problems, and we had some problems in this case. I was told, as you mentioned, that there would be a full investigation made of it by the Office of Professional Responsibility. I have heard via third-, fourth-, fifth-, or sixth-hand hearsay that an investigation was conducted and that everyone was cleared. I have never received any official communication from anybody concerning the investigation. No one ever talked to me; that I know of my own knowledge. I have asked the shorthand reporter who was present in the courtroom at all times and the courtroom deputy who was present in the courtroom at all times, and I have asked Mr. Miller, who is the U.S. attorney for the district of Colorado, and I have asked defense counsel, and I also asked the reporter for the Rocky Mountain News that covered most of the case.

If anybody from the Department of Justice ever talked to any of them about what went on during this trial, and I have found no one who was ever talked to by anyone. I don't know what the investigation was or how they arrived at the conclusion they did. I am not even sure they have arrived at a conclusion. As I say, that is hearsay.

But nobody has ever talked to me. In my opinion, I said that the matter was something which could be referred to our local committee on conduct, that I thought that it best that it be investigated inhouse. I still think that.

The Department of Justice is a large organization. It is a fine organization. Any time you have that many employees, you are going to have a few problems.

Senator, that is about all I have to say; and if I can answer any questions, I would be happy to.

Senator ARMSTRONG. Judge, I am grateful to you for what you have said and for your coming here. And I have a number of questions that I want to ask, but I would like to comment briefly on two matters that you have mentioned before I ask you to go through several quite specific issues that I would like to have your observations on.

First, you pointed out that the U.S. attorney for Colorado and his staff have not been the subject of criticism in the *Kilpatrick* case.

And while I don't think I said that in my opening statement, I want to agree that——

Judge WINNER. No; you did not, sir. I simply wanted to emphasize it because I do not want those people to be subjected to unfair criticism.

Senator ARMSTRONG. No; I agree. I meant that I had not made a point of saying that they were not involved, but clearly, Mr. Miller and his people were not the subject of any criticism that I was aware of either.

Second, you made the observation that the Justice Department and its divisions should not be subject to blanket criticism. And I agree with that. In fact, the extent to which, if any, such criticism attaches to the Department of Justice, is really in part the function of this hearing, but criticizing people or passing judgment on somebody's professional ethics or how well they are doing their job or whether they are running the Department right is only secondarily what we are trying to get at.

The questions which I am trying tc agree to at this hearing are, first: What legislative response, if any, is called for by the circumstances which have been brought out in the *Kilpatrick* case and the *Omni* case and the others that we are going to look at? In other words, we have seen some court decisions in which the courts have been highly critical of some aspects of the handling of certain specific cases.

The question is, Is there anything that is needed in the way of a legislative response? Do we need to change the law? And in fact, I am going to ask specific questions.

Second, to what extent, if any, do we need to hold the Department of Justice or IRS accountable for their management of the Department and the enforcement of the present law? In the final analysis, no matter what laws are on the books, if prosecutors and the others are not scrupulous in their ethical standards, then you get a situation of selective enforcement, of improper immunities, use of the grand jury process, violation of the Constitution—which is cited in your opinion—and while it isn't primarily the function of this subcommittee or of any committee of Congress to pass judgment on individuals, if there is a pattern of failure to manage properly or failure to insist on high standards, then I think we want to know that, and we are going to see that some effort is made to rectify it.

With that as a basis, judge, I would just like to go through several of the items mentioned in your decision in a very informal way and just ask you to comment both from the standpoint of management of the enforcement system and from the standpoint of legislation.

Now, first is this question about the grand jury. You made a great point and properly so that the grand jury process has been abused. One of the issues you raised was the question of swearing in special IRS agents as agents of the grand jury. Now, if I understood your point correctly, it is that it is improper to do so. My question is, what should be done about it? Is this a common practice? Has it been something you have observed previously?

Judge WINNER. No, sir. I have never observed it previously. In posttrial briefs, I was told that it had been done other places. Some courts have found nothing wrong with it. Other courts have found that it is improper.

The function of the grand jury as I understand the history of the grand jury is that it was to be a neutral body standing between the citizens and the king. I believe that is a part of the Magna Carta. I believe that is a part of our American system of justice. Every time a grand jury is impaneled, it is recommended that the judge inpaneling the grand jury read to them or give to them a copy of the instructions to the grand jury prepared by the Judicial Center of the United States. Those instructions emphasize that point, and the point is that the grand jury is to be totally independent.

To me, it is a contradiction of terms to have an independent, quasijudicial body employ, as one of its agents, agents of the prosecution. I just can't reconcile it in my thinking. That is why I am bothered by it.

Now, certainly, I have no objection to having the grand jury be given the power to employ agents—investigative agents—but they should be answerable to the grand jury and they should not be answerable to the prosecutor if we are going to retain the concept of an independent grand jury. That is my thinking on it.

Senator **Armstrong**. Judge, according to the records, as I understand it, a Mr. Jake Snyder administered an oath of secrecy to an IRS special agent by the name of Bendrop. And the point is that he didn't have the authority to administer such an oath.

Judge **Winner**. Well, sir, I am going to differ from you just——

Senator **Armstrong**. I am here as your student.

Judge **Winner**. I am just going to differ in a small particular. Mr. Snyder did indeed administer an oath. He did not have the authority to administer an oath, and the Government concedes that. Prosecutors can't administer oaths. They can do lots of things, but that is one thing that the legislative branch has not permitted them to do.

Now, as to the secrecy matter, for countless years it was the custom to tell everybody who appeared before the grand jury, and it is still the custom in our State courts, that everything that goes on before the grand jury is secret and you cannot disclose anything. And if you do, you are in contempt. The Congress amended that rule after a great deal of study and input from the American Bar Association and many others. And it is now expressly spelled out in the rule that no oath of secrecy can be administered to a witness.

The grand jurors, the shorthand reporter, and counsel are subject to the secrecy requirement; but the rule expressly says no oath of secrecy can be administered to a witness. Witnesses were put under an obligation of secrecy in this grand jury proceeding. Again, in the Government's brief, they acknowledge that that was wrong, but they said it was so-called "harmless error," and perhaps it was; but perhaps it wasn't because some of the witnesses who were given the obligation of secrecy were lawyers who, if they lived up to their obligation—and I never did ask them whether they did or didn't—could not even communicate to their own client what went on. And that puts them in an impossible ethical bind; and that bothered me.

Senator **ARMSTRONG**. The point is that Mr. Snyder was an attorney for——

Judge **WINNER**. He was an attorney with the Tax Division of the Department of Justice, and he was the principal trial attorney during the trial, and he was the principal attorney conducting the grand jury investigation.

Senator **ARMSTRONG**. Would it be reasonable—and you understand, Judge, that I am not an attorney—I am here in my role as a legislator, and I want to stay completely clear of trying to practice law. Is it fair for me to assume that somebody in the professional position that he was in would know that it was improper to administer such an oath?

I am not really asking whether he did or not. I am just saying: Is that a reasonable professional position——

Judge **WINNER**. I am going to quibble with you a little bit.

Senator **ARMSTRONG**. All right.

Judge **WINNER**. I am going to say it is reasonable to presume he should know it.

Senator **ARMSTRONG**. Thank you; that is what I want to know because what I am really trying to elicit is the kind of questions that I will want to put to the Justice Department next week.

Judge **WINNER**. I do not wish to suggest that he did know it. I do not wish to suggest that what he did was not done innocently.

Senator **ARMSTRONG**. I understand; but it is reasonable to assume that he should have known?

Judge **WINNER**. Yes, sir. I think he should have.

Senator **ARMSTRONG**. And it would be reasonable, I take it, in your view to assume that the Justice Department, having been through this experience in your court, would make some effort to make this known to people in similar circumstances in other courts.

Judge **WINNER**. I would think it would be covered in a basic training course in criminal procedure.

Senator **ARMSTRONG**. All right. Let me just make a note, and we will ask them if there is such a basic training observation.

Judge, the Government characterized at one point as "silly and frivolous" the concerns which—the matters which were criticized by the court. And I believe that the court was concerned about the flippant phraseology. I guess there——

Let me ask this in a neutral way. If I understood what happened, there was a concern on your part that the Government simply didn't take these issues seriously. Is that a fair characterization?

Judge **WINNER**. That is correct. They didn't take them seriously. They openly said they were silly. To me, when there is reason to be concerned about the violation of a man's fundamental rights which may put him in prison, I cannot think that is silly.

Senator **ARMSTRONG**. The next note I have deals with a matter which you referred to a moment ago, and that is the question of trying to impose secrecy obligations on witnesses who were in fact also providing legal counsel. I think you have already explained that. If you impose such an obligation on a lawyer, you inhibit his ability to represent his own clients.

Judge **WINNER**. I think you do worse than that. I think you put him in a position that he is violating his ethical duties to his own client. So, if he obeys the obligation imposed upon him, he may get disbarred; but if he doesn't get disbarred, then he is violating the obligation. He has really got a tough problem.

Senator **Armstrong**. Now, I would like to talk about Mr. Richard Birchhall. I understand he is an attorney and a former Tax Division lawyer. He did testify before the grand jury in his capacity as an attorney for one of the defendants.

Judge **Winner**. Yes, sir.

Senator **Armstrong**. While questioning him in a bar, prosecutor Snyder allegedly violated Federal rules of criminal procedure—the secrecy provisions—by telling Birchhall about matters before the grand jury, telling Mr. Birchhall he was a potential target and mentioning testimony about a personal relationship of Mr. Birchhall's, a comment which was bothersome to the witness because of his marital problems.

Birchhall was later left in a room where grand jury transcripts were stored, with transcripts and material lying on a table in plain sight. Birchhall, I understand, scanned some of the material, and he claims that "Mr. Snyder tried to persuade him to breech his ethical duty of confidentiality," and he attributed to Mr. Snyder a remark that "even if the defendant wasn't guilty, the Government would break him with the cost of the defense."

If all of this is true, I take it there is no doubt that this would be grossly improper conduct.

Judge **Winner**. If that was true, it certainly would be grossly improper. That was the substance of Mr. Birchhall's testimony. I made no finding that those things happened. I never did hear any testimony contradicting it. I am told that there was later testimony contradicting it. I made no finding on it; I simply recite testimony which was given.

Senator **Armstrong**. I understand. The reason why that is of particular interest to me, aside from just the fact that it does raise the gross question of propriety, is that in the first telephone call which I received—the first of many telephone calls which I received—from Mr. Kilpatrick, his assertion to me was that the Government didn't really necessarily expect to win the case, but what they were trying to do was to put him out of business, that the publicity attendant to the indictment and subsequent prosecution would be sufficient to raise enough doubts about his business dealings that it would put him out of business.

And if I remember—and Mr. Kilpatrick when he has a chance to speak tomorrow can contradict me or refresh my recollection or whatever—but my recollection of that conversation is that they simply didn't like the business he was in and intended to use prosecution—the indictment—to simply ruin his reputation.

And that is the essence, if I understand it, of what Mr. Birchhall was told, that they were going to break him just by the process, whether or not they could find him guilty or not.

Judge **Winner**. That was Mr. Birchhall's testimony; yes, sir.

Senator **Armstrong**. I understand, and I understand you didn't enter a finding on it; but I just wanted to be sure I have the correct understanding of what the testimony was.

Judge **Winner**. Yes, sir; that is correct, sir.

Senator **Armstrong**. I would now like to turn to the questions regarding the alleged harassment of the expert witness from the University of Washington. I am not sure how he pronounces his name. It is Prof. Rowland Hjorth.

Judge **Winner**. I think it is Horth.

Senator **Armstrong**. Horth?

Judge **Winner**. I think that is a silent j; I believe.

Senator **Armstrong**. The staff tells me that your recollection is the same as ours—a silent j. Professor Hjorth is a tax law professor at the University of Washington. He is an expert who was employed by defense counsel and was permitted to testify as an expert before the grand jury.

Evidently, his views were significantly different than those of the prosecutor, Mr. Snyder, who reportedly bragged on frequent occasions that he had never taken a course in taxation and knew almost nothing about it. During a recess, it was brought to my attention that Professor Hjorth was apparently brow-beaten and ridiculed by the prosecutor; and in response to this issue, the Government's brief did not deny that the occurrence took place and called it poor judgment. Mr. Snyder apparently told Mr. Hjorth that his testimony disgraced him and implied that the Tax Division of the Department of Justice would complain to the University of Washington Law School.

Now, I am assuming that you entered no finding on that issue.

Judge **Winner**. No, sir; I did not.

Senator **Armstrong**. But the question I would like to ask you is this: Were this to be true, there is no doubt that this would be a gross violation of the rights of the expert witness?

Judge **Winner**. Right, sir. The expert witness has a great many rights, as does witness, but even more importantly, rights of the defendant. If a defendant can't present expert testimony without having the expert threatened with getting his job, we don't have a defense system in America today; but whether it happened, I don't know. I do know it is all hearsay—by hearsay, I mean it is all the professor's testimony except for one thing—the transcript reflects that the prosecutor frequently stated that he had never taken a course in tax law.

Now, that is from his own lips.

Senator **Armstrong**. As far as I know, we do not have Professor Hjorth scheduled to testify. We may do that at some point, but he was quoted in a newspaper article that came to my attention as saying that he would never willingly testify before a grand jury again. And he said this as a person who had been summoned repeatedly on prior occasions as an expert witness.

Judge **Winner**. He testified that he would never testify as an expert witness again. Now, that testimony he gave. He said he had had it, so far as being an expert witness was concerned—never again.

Senator **Armstrong**. I don't think there is any point in pursuing the matter of the conversation between Peter Parrish, a former IRS agent, and the prosecutor, Mr. Blondon; but let me just note for the record that we were discussing earlier the question of violating secrecy of the grand jury process.

The same question is raised by the question of IRS agents writing letters on the U.S. attorney's letterhead. Special agents of the grand jury were authorized by prosecutors to write letters on the letterhead of the U.S. attorney although without the knowledge of the U.S. attorney. These letters further breached the Federal rules of criminal procedures on secrecy and disclosed the identity of persons and transactions under grand jury scrutiny.

Judge, I would now like to turn to this question of pocket immunity. I was very much interested in your observations about that earlier. You said first that you thought there ought to be some kind of penalty for a prosecutor who improperly uses his prerogative of granting pocket immunity. What do you have in mind—what kind of a penalty? And is there no penalty at the present time?

Judge **WINNER**. I know of no penalty at all. I think that it is something that can be done and is done very frequently, and it is done with the approval of some courts. I think it is a legislative decision as to whether the Congress of the United States is entitled to have a record of every grant of immunity; and there ought to be, in my judgment, a prohibition against a grant of immunity, save and except in accordance with established procedures spelled out by statute.

I used the word "penalty," and I don't know what the penalty should be; but it ought to be more than a slap on the wrist.

Senator **ARMSTRONG**. When you say a penalty, do you mean a penalty against the prosecutor who uses it improperly?

Judge **WINNER**. Yes, sir.

Senator **ARMSTRONG**. Not something that would necessarily void the immunity?

Judge **WINNER**. Oh, no, no. Just a penalty against the prosecutor who uses it, just to try to make them obey the law that Congress has created.

Senator **ARMSTRONG**. And at the present time—forgive me for not knowing this fact—but at the present time, does Congress receive a report of these grants of immunity?

Judge **WINNER**. The Congress does receive a report of formal grants of immunity, that is of all immunities granted pursuant to statute. They have absolutely no knowledge concerning the so-called pocket immunity. The requirement for that report was established 10 or 15 years ago, something like that, because of criticisms which surfaced at that time concerning the lack of knowledge on the part of anybody who was getting immunity.

I don't recall to whom the report is made, but there is a report made; and it is available.

Senator **ARMSTRONG**. Of formal immunity?

Judge **WINNER**. Yes, sir; by the Department of Justice.

Senator **ARMSTRONG**. In the case of Mr. Kilpatrick, you mentioned that the prosecutor, Mr. Snyder, evidently told Richard Bell that—and I think this is a quote—"if Richard testified for Mr. Kilpatrick, all bets are off."

Judge **WINNER**. Yes.

Senator **ARMSTRONG**. He had been offered immunity.

Judge **WINNER**. That testimony was very fuzzy. He testified that the statement was made that if he testified for Mr. Kilpatrick, all bets are off. His brother, who was a lawyer and was representing him, made a statement for the record that he understood that to mean that, if he committed perjury, all bets are off. The lawyer-brother understood it that way. The witness-brother understood that if he testified at all, all bets were off. And the witness thought that if he testified, he had no immunity; at least that was his testimony. That is another reason that pocket immunity, in my judgment, is a mistake because it always will get fuzzy as to what is agreed to.

Senator ARMSTRONG. Your point is that, if immunity is granted, it should be on the record?

Judge WINNER. Yes, sir.

Senator ARMSTRONG. It shouldn't be that casual?

Judge WINNER. Absolutely. Under the statute, you have to read a written order granting the immunity and spelling out what the immunity is and its extent. It was always my practice, and I believe it is the practice of most judges, to supply the recipient of the immunity with a copy of the written order. Then, there is no uncertainty about all bets being off.

Senator ARMSTRONG. I am going to guess, Judge, that that will be a matter of legislative inquiry.

Judge WINNER. I would think so.

Senator ARMSTRONG. There may be some aspects of this that frankly are just beyond the reach of legislation; but that sounds like an area that we could productively get into.

One of my notes here is an allegation of extraordinarily discourteous treatment of an attorney by the name of James Triese, himself a former U.S. attorney for Colorado. I don't know that we can do anything about that. I am assuming if what I have here in my notes is correct and he was rudely handled, that may be too bad, but that is not something we can get at. This question of the immunity, we undoubtedly can.

Judge WINNER. That is a personality matter.

Senator ARMSTRONG. Exactly. Judge, do you have a recollection of the issue that came up about the defendant Decland O'Donnell appearing before the grand jury without counsel?

Judge WINNER. Yes, sir.

Senator ARMSTRONG. What is the issue there? I don't quite understand that.

Judge WINNER. The issue there is what lawyers frequently refer to as the *Messiah* problem. Messiah was the name of the person in a case before the U.S. Supreme Court, which restricts the power and the right of the prosecution to communicate with indicted defendants who are represented by counsel. There is a difference of opinion among people as to whether that rule does or does not, should or should not apply to unindicted defendants. Of course, the law enforcement agencies think it should not; and of course, all defense lawyers think it should. And there is a difference in the opinions. Mr. O'Donnell was taken before the grand jury at a time that it was undisputed that he was represented by counsel, and there is a question there as to whether that was or was not a violation of Messiah.

I made no ruling on it. I simply said that the problem was there and that he might be jeopardizing in some future case a conviction because of it; but I did not express an opinion as to what the result would be.

Senator ARMSTRONG. With respect to jeopardizing some future conviction, that reminds me of your reference to the *Mechanics* case. Maybe we ought to explore that a little because I thought the point of the *Mechanics* case was that, after a conviction, you can't go back and get at the abuses of a grand jury. In other words, you can't overturn a conviction.

Judge WINNER. That is correct, sir.

Senator ARMSTRONG. Because of grand jury abuse.

Judge WINNER. It is my understanding that it is the holding of the majority of the Supreme Court that, because a trial jury found guilt, then there is no problem about probable cause, and therefore, there is nothing wrong with the grand jury indictment. Well, I am a great admirer of Justice Sandra Day O'Conner and I wholeheartedly agree with her dissent in that case.

Senator ARMSTRONG. I see. But what it emphasizes, though, is that unless there would be some change in the outcome of the *Mechanics* case, that it makes it doubly important that the grand jury procedure be sanctified.

Judge WINNER. Oh, absolutely, sir; absolutely.

Senator ARMSTRONG. I have, and I will ask the Justice Department at the right time about the question of transcripts. As I understand it, there is an issue that the grand jury transcripts were in the custody of the IRS, and they should have remained with the attorney.

Judge WINNER. I don't believe there is an issue on that. I think it is admitted.

Senator ARMSTRONG. They have admitted that they have done it, but there is no legislative issue in the sense that it is clearly improper at the present time. They just shouldn't have done it.

Judge WINNER. It is clearly improper at the present time. The only possible legislative issue is: Should any penalty be imposed for violating the present rules?

Senator ARMSTRONG. Then I suppose there is an oversight question as there is in all of this of what steps has the Justice Department taken to avoid this being a habitual practice, obviously. In a large and complex legal system, mistakes will occur; and if this is the only time it happened, fine, but if it happens all the time—a regular and frequent thing—then it would be a source of concern from a management standpoint.

Judge WINNER. This is the only time I have ever known of it to happen.

Senator ARMSTRONG. Tempers by prosecutors: one of the things which comes to my attention is that one or more of the prosecutors shouted at you from counsel's table.

Judge WINNER. Oh, no. He wasn't at counsel's table. He was back in the spectator section.

Senator ARMSTRONG. He was back in the spectator section?

Judge WINNER. Oh, yes.

Senator ARMSTRONG. But it was a prosecutor?

Judge WINNER. Yes; in a way. It was a very unusual situation. He was a prosecutor when the jury was out of the courtroom, but he was a spectator when the jury was in the courtroom. This trial had its odd aspects.

Senator **Armstrong**. That is very clear. The whole thing is just far beyond my experience, and what I am trying to do is just find out what I need to know in order to relay to the Department of Justice. You made the point that you didn't want to have a blanket criticism of the Department, and I agree with that; but I can report to you just in passing that, at least to some extent, there has been an attitude on the part of the Department of Justice to simply close ranks behind their people. And that is a natural bureaucratic response, but it is not necessarily an admirable one.

In reviewing the notes from Judge Kane's decision, which you are familiar with, the same issues really arise: special grand jury agent, improper summarization of evidence. I think we have not talked about that. Is there a question that I should try to raise about that?

Judge **Winner**. Senator, my study of the grand jury transcripts was not as detailed as Judge Kane's, and I did not catch that. Judge Kane explains it in his opinion, and I have no personal recollection of it.

Senator **Armstrong**. I understand. We will put both your opinion and that of Judge Kane in the record, along also with the *Omni* decision.

[The opinions of Judge Kane and Judge Winner and the *Omni* decision follow:]

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## THE PUBLICATION OF JUDGE WINNER'S OPINION

● **Mr. ARMSTRONG.** Mr. President, the events surrounding the publication of a court opinion issued by a Federal district judge in Denver, Colo., has been the subject of a number of recent news accounts and editorials. Briefly, the Justice Department sought and received a temporary restraining order blocking publication of an opinion rendered by Federal District Court Judge Winner. The fact that the Justice Department would seek, and another Federal court would grant such an order is remarkable. But, the temporary restraining order has been revoked and the opinion will be published in the near future.

However, in all this flap over the attempt to block publication, we should not lose sight of the larger issues raised by Judge Winner. In essence, he is blowing the whistle on questionable conduct of government prosecutors. After reading Judge Winner's decision, my first reaction was to call for hearings to shed additional light on the issues raised in his opinion. I understand that both the Federal district court and the 10th Circuit Court of Appeals have different aspects of this case under review. With that in mind, the proper course may be to wait for the findings from these hearings before we begin our examination of this matter and determine what action Congress should take to insure protection against government misconduct.

In the meantime, I comment to my colleagues the following articles and other accounts of this important issue:

[From the Denver Post, Jan. 27, 1984]

### JUSTICE DEPARTMENT TRIES TO GAG JUDGE WINNER

(By William R. Ritz)

The U.S. Department of Justice, in a move angrily derided as "blatant federal arrogance" and "unshirted censorship," is attempting to stop publication of an opinion by a Denver federal court judge in which he accuses three federal prosecutors of misconduct.

The Justice Department's request for a temporary restraining order quietly was approved by the 10th U.S. Circuit Court of Appeals earlier this month. The order bars West Publishing Co. of St. Paul, Minn., from printing a decision by U.S. District Judge Fred Winner in the Federal Supplement, a hard-bound compilation of federal-court decisions.

A decision by the appellate court on whether to make the order permanent could come as early as this week.

But the decree could be anti-climactic because, whatever the outcome, the battle pitting lawyers and civil libertarians against the Justice Department and appellate court already will have been going strong.

At issue are three important constitutional points, say opponents of the restraining order: prior restraint of the publisher, censorship of a federal judge, and the separation of branches of the government.

"We're talking about a First Amendment right of a judge to publish his opinion and the Department of Justice trying to suppress that right, which we believe to be absolute," said Richard Rufner, one of the attorneys in the case.

"Then you have a separation-of-powers problem with the executive branch trying to ride herd over the judicial branch and prevent it from carrying out the judicial branch's rights and responsibilities.

"It's astounding," he said.

"When the indictment came down in 1982, the Department of Justice issued a four-page press release without worrying about the reputations of the accused before they had their day in court. Now, suddenly, they are extremely worried about the reputations of their attorneys . . . claiming they have not had their day in court.

"What's good for the goose is good for the gander," he said.

(Glenn L. Archer Jr., the head of the Justice Department's tax division, said in an interview with The New York Times that the prior restraint on publication was necessary because the "slanderous" judicial opinion unfairly criticized three of his prosecutors.

(Lawyers involved in the case and other legal experts said they knew of no previous instance in which a private publisher had been barred, on pain of contempt of court, from publishing a judicial opinion.)

### "THIS IS A GAG ORDER"

If the restraining order is upheld, legal officials told The Denver Post, it could have a chilling effect on the independence of American judges.

"This is a gag order, pure and simple. It's blatant federal arrogance," snapped lawyer Donald E. Van Koughnet of Naples, Fla., who was involved with the defense of the case in its early stages.

"What we're saying here is 'the judge has discretion, but (Winner's opinion) is an abuse of that discretion," countered Justice Department spokesman John Wilson.

"Since when does the executive branch decide what is or isn't proper for the judicial branch," questioned a Denver lawyer who asked not to be identified.

"It's the same kind of abuse of power that resulted in the Pentagon Papers case," said Edwin Kahn, a Denver lawyer whose firm frequently does work for the American Civil Liberties Union. "except here, instead of trying to suppress information critical of the government's conduct of a war, they apparently are trying to suppress a judge's written opinion critical of government prosecutorial misconduct in the courtroom."

Is it illegal?

"Yes, in the sense it involves an unlawful attempt by the government to suppress information," Khan said.

Kahn said he and David Miller, director of the Colorado ACLU chapter, will review the case file Monday and make a recommendation to the ACLU about "what, if anything, it ought to do."

### CASE STARTED IN 1982

The problem goes back to 1982 when the Department of Justice, concluding a 21-month investigation by its tax diversion and the Internal Revenue Service, indicted seven persons and the Bank of Nova Scotia on as many as 27 counts each of conspiracy, mail fraud, obstruction of justice and,* * *

Eventually, all but one of the counts, an obstruction-of-justice charge against William A. Kilpatrick of Littleton, were dismissed. In a trial in U.S. District Court in Denver last spring, Kilpatrick was convicted of obstruction of justice.

But defense attorneys, alleging misconduct by IRS agents and three prosecutors from the Department of Justice in Washington, asked for dismissal of the indictment or a new trial.

Six days of hearings on the defense motion were held last summer and, on Aug. 25, Winner granted Kilpatrick a new trial in a lengthy, scathing opinion on which the legal imbroglio is centered.

Winner described Kilpatrick's trial as "an ill-starred case which had its first questionable conduct during the opening two minutes of grand jury investigation and which had conduct suspect under the Canons of Professional Responsibility lasting into post-trial hearings."

The bulk of his wrath was aimed at three Justice Department prosecutors: Stephen "Jake" Snyder, Jared Scharf and Thomas Blondin, who directed the government's case from the grand jury through the criminal trial.

Among the examples of alleged misconduct were:

The use of two IRS agents as sworn "agents of the grand jury," dubbed by Winner as "IRS special agent/grand jury agents/prosecutor's helpers."

Abuse by prosecutors of rules governing grants of immunity for prosecution witnesses.

### WITNESS RELEASED

The release by prosecutors of a subpoenaed witness, although court rules specify that the witness can be released only by a judge.

At the direction of two prosecutors letters were written on the letterhead of the U.S. attorney for Colorado without the U.S. attorney's permission.

Disclosure by prosecutors of secret grand jury testimony to unauthorized persons.

Intimidation by prosecutors of defense witnesses in front of the grand jury.

Winner said the government described many of the accusations of misconduct by defense attorneys as "silly, but they aren't either silly or frivolous. And if the overlords of the tax division think this whole mess is just a ploy, I recommend that they take a second look."

In addition to being printed for the local news media, Winner's opinion was sent off routinely to West Publishing, a private firm, for inclusion in the next volume of the Federal Supplement. Each volume of the Federal Supplement, a thick book of decisions rendered by federal judges around the country, is purchased by thousands of law firms and legal libraries around the country.

Initially, all of the submitted decisions are printed in so-called "advance sheets," unbound paperback volumes that are widely circulated. Several weeks after the "advance sheets" are published, they are reprinted in hardback volumes.

On Sept. 6, almost two weeks after Winner's decision was issued and after it was sent to West Publishing for inclusion in the Federal Supplement, the Justice Department asked in a motion that Winner's opinion either be withdrawn or amended by deleting all names of prosecutors and information identifying them. Winner rejected that request the next day.

That rejection was the subject of another government appeal, filed about 10 days later. But the government's supporting documents weren't filed with the court until Nov. 29.

Meanwhile, Winnet's decision already had been published in the "advance sheet" for volume 570 of the Federal Supplement and circulated throughout the country.

On Dec. 27, the government said it was told by Charles Nelson, editor-in-chief of West Publishing, that the deadline was Dec. 30 for the hardback edition of volume 570 containing Winner's decision. In addition, Justice officials said they were told the only way to stop hardback publication of an opinion from the "advance sheet" was by order from the district court or appeals court.

Two days later, on Dec. 29, the Justice Department filed an emergency motion with the 10th U.S. Circuit Court of Appeals, asking for an order forbidding West Publishing from including Winner's opinion in the hardbound version of volume 570 of the Federal Supplement.

Winner's allegations of prosecutorial misconduct "are defamatory and potentially harmful to the prosecutors named in the opinion," Assistant Attorney General Archer wrote in the emergency motion. Winner's discussion and identification of the prosecutors "was unnecessary" in ruling on the defendant's motion for a new trial, Archer said.

For filing with the 10th Circuit Court in Denver, Justice officials electronically transmitted Archer's motion from Washington to the U.S. attorney's office in Denver, which relayed it to the appellate court. But copies of the motion for the defense attorneys, instead, were mailed and didn't reach their offices until Dec. 30, which left defense attorneys little time to develop responses to the motion.

On Jan. 3, Judges William Holloway Jr. of Oklahoma City, Okla., and Stephanie Seymour of Tulsa, Okla., both appellate judges, and Senior U.S. District Judge Luther Bohanon of Oklahoma City, who had been appointed to sit temporarily on the appellate bench, granted Archer's request. Their temporary restraining order forbade West Publishing from including Winner's opinion in the hardbound volume until further evidence could be studied by the appellate judges.

Few involved in the case would comment on it.

Judge Holloway and U.S. District Judge John Kane Jr., who must hear the re-trial of Kilpatrick, refused comment because the case was pending before them.

Winner, who retired from the bench last September, declined comment pending final resolution of the case.

West Publishing Editor-in-Chief Nelson and Managing Editor James Corson refused to return telephone calls.

"I'm utterly shocked that as responsible a publisher as West Publishing Co., which publishes the national reporter system used by the entire American legal profession and judiciary, would not stand up and be counted on to challenge this gag order," said defense attorney Van Koughnet.

Contacted at his Minneapolis office, Vance Opperman, an attorney for West Publishing, said the company "always follows court orders."

The Supreme Court has ruled on several occasions, including its 1971 Pentagon Papers decision rejecting the Nixon administration's effort to bar newspapers from publishing a classified Defense Department study of the Vietnam War, that any "prior restraint" on publication "comes to this court bearing a heavy presumption against its constitutional validity."

WINNER'S OPINION/EXCERPTS

"* * * I don't think that an IRS special agent can act in the combined capacity of IRS agent, 'agent for the grand jury,' and recipient of grand jury information . . . for the sole purpose of helping out the prosecutor. This is a confusion not of apples and oranges. It is confusing apples, oranges and bananas."

"* * * the government is playing with fire in arguing that good motive excuses making one's own law."

"Mr. (Stephen) Snyder's good intentions don't excuse his arrogation of a power that he didn't have. And, even if the illegal 'oath' doesn't amount to serious error, it started the case downhill on a course of repeated excesses on the part of the prosecution."

"I don't know how it can be argued that this language permits disclosure to IRS agents to work as 'agents for the grand jury' unless it is argued that the grand jury is simply an arm of the prosecutor's office, and if that be the argument, almost 800 years of history is going to have to be forgotten. The document King John signed at Runnymede contains no such concept, nor does our Constitution."

"It seems pretty clear to me that the IRS agents to whom disclosure was made were hired guns of the prosecutor and the IRS—not of the grand jury."

"No 'oath' of secrecy was administered, but an obligation of secrecy was imposed by instructions from government counsel to witnesses. This foolishness may or may not have been intentional, but ignorance of the law is not a defense available to a prosecutor . . . This misconduct is established by the record, and it will prove difficult for the government to deny . . ."

"Intimidating witnesses by telling them that their testimony disgraces them and implying that the Tax Division of the Department of Justice will take after the witness . . . because an expert testified to his expert opinions does no credit to our government."

"Usually when a case goes to the jury, there are no more difficulties to be encountered, but that's not so in this ill-starred case which had its first questionable conduct during the opening two minutes of grand jury investigation and which has conduct suspect under the Canons of Professional Responsibility lasting into post-trial proceedings."

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## Ban on Judge's Opinion Attacked—Questions Raised Over Publication Block

(By Mark Thomas)

A precedent-setting order blocking the publication of an opinion by a former Denver federal judge has prompted accusations of unauthorized censorship and raised questions about First Amendment privileges.

The order, which the American Civil Liberties Union began studying Friday for possible constitutional violations, is attracting national attention and is under fire for being "an attempt to muzzle a federal judge."

Issued earlier this month by a three-judge panel of the Denver-based 10th U.S. Circuit Court of Appeals, the order stopped an opinion by former U.S. District Judge Fred M. Winner from being published in the Federal Supplement.

At issue is Winner's Aug. 25, 1983, opinion ordering a new trial for William Kilpatrick of Littleton, who was convicted in federal court in Denver last summer of obstruction of justice charges in connection with an alleged tax-shelter fraud.

Winner found that Kilpatrick should get a new trial because of a "preliminary factual showing of serious misconduct" on the part of three U.S. Department of Justice Tax Division attorneys during grand jury proceedings.

The prosecutors were accused of intimidating witnesses before the grand jury, failing to keep secret grand jury testimony in a secure place, and offering unauthorized "pocket immunity" to witnesses.

"Winner's highly critical opinion stopped short of finding them guilty of prosecutorial misconduct of dismissing the indictment. Winner left that decision to U.S. District Judge John L. Kane, Jr., who took over the case after Winner's retirement in October.

After Winner rejected a government motion requesting that the opinion be withdrawn—or that the names of the prosecutors be deleted—the government asked the 10th Circuit court to block West Publishing Co. of St. Paul, Minn., from printing it in a permanent volume of the Federal Supplement.

The government claimed that Winner had failed to keep the opinion free of "impertinent, defamatory and scandalous matters," and that his comments on the allegations of misconduct were potentially harmful to the three prosecutors.

On Jan. 4, just a few days before the opinion was to be printed, the 10th Circuit ordered West Publishing to postpone its publication. The panel of 10th Circuit Judges William J. Holloway Jr., Stephanie K. Seymour and U.S. District Judge Luther L. Bohanon of Oklahoma City ruled that further hearings on the misconduct allegations should be completed before the opinion was published.

The 10th Circuit also has directed attorneys for Kilpatrick and other defendants in the case to show cause why the order should not be made permanent. A ruling on the permanent prohibition is pending.

Edwin S. Kahn, a volunteer attorney with the ACLU in Denver, said the order "calls into question some very important First Amendment principles."

Kahn said the order apparently violates not only Winner's First Amendment rights, but also the right of the public to know what was decided by the trial court.

"Judges say a lot of nasty things about people in their opinions, it's their job to evaluate how cases are presented. They have to call them how they see them. If he saw it wrong he'll be reversed. That doesn't mean you shouldn't be able to read about his finding," Kahn said.

The ACLU will have to review the case filed before deciding whether to intervene, but Kahn said "if the factors are as reported, it certainly appears to be highly irregular. It's not the function of the appeals court to tell a publisher what he can and cannot print."

John Wilson, a Justice Department spokesman in Washington, said the government does not see the 10th Circuit's order as having anything to do with First Amendment issues.

We're saying he abused his discretion by including the names of the attorneys who we say are victims of allegations that are not correct. What we wanted to do was prevent the disclosure of their names. That's all there was to it. We aren't attempting to muzzle anyone," Wilson said.

Wilson said that if Winner agreed to delete the attorney names—Steven L. "Jake" Snyder, Thomas Blondin and Jared Scharf—the government would not oppose the publication of the opinion.

Winner, currently working as an adviser to a law firm, declined to comment about the 10th Circuit's order. But in response to Wilson's statements about deleting the names, he said, "If they want to talk about it they can call me."

William C. Waller, Kilpatrick's attorney, said he believes the order sets "a dangerous precedent."

"Its important to realize that we have a common-law system which relies on previous opinions in deciding questions of law. The government's conduct in a case is a developing area of the law, and courts have the right to see how other courts have dealt with it," Waller said.

Motions filed by Waller and attorneys for other defendants still involved in the case said the government's attempt to block publication "is a classic example of an effort to obtain prior restraint.

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[From the Wall Street Journal, Jan. 25, 1984]

## Rocky Mountain Low

All right, it's no Pentagon Papers case. The Justice Department's Tax Division recently got a federal appeals court to postpone publication of an opinion by a Colorado district court judge. The incident is full of sides and ambiguities. It is not the kind of trumpeting outrage that should summon forth the civil liberties soldiers to battle under the flag of high morality. But the case does pose a danger to free speech, and gives us a lesson in where similar dangers are liable to arise in the future.

In 1982 the Tax Division got a grand jury to indict a bank and various individuals for tax fraud in connection with an allegedly illegal shelter. The Justice Department issued a press release, as is its practice, announcing the indictment and naming names. This past summer, the district court judge ordered a new trial for the by-then last remaining defendant and called for hearings on whether the whole indictment should be thrown out.

The judge said preliminary evidence indicated that Justice Department laywers had railroaded the grand jury. They allegedly had falsely told witnesses that testimony had to be kept secret, had threatened an attorney with prosecution to make him breach lawyer-client confidentiality, and had browbeaten an expert witness. The judge, too, named names, this time the names of the allegedly guilty department attorneys. He had his opinion printed and disseminated in preliminary form.

The Tax Division thought the judge's accusations, presented without giving the lawyers any chance to respond, were slanderous. The department got the appeals court to prevent the opinion from becoming part of the permanent volume of record until the court had finished further consideration of the whole matter. A department official says this was not prior censorship because the opinion is available in preliminary form.

This distinction between the preliminary printing of the opinion and the final printing does make the issue of prior censorship a little murky—but not much. What is important about the freedom to print is not just the ability to put your view before people for a given day or a given week. It is also—and even more important—the chance to form the record to which people will refer years from now. Closed societies do not just censor newspapers; they censor the history books as well, and for good reason. Prior censorship is as obnoxious in the latter case as in the former.

We sympathize with the Justice Department's wish to protect the reputations of its lawyers against accusations involving truly obnoxious prosecutorial practice. It is awful to be dragged publicly and unjustly through this kind of mud. In fact, this may be the time to remind these energetic prosecutors that public mudslinging before all the facts are in is just as awful for a private citizen whom the department has just visited with an indictment and a press release.

Judges should be very careful when leaning on prosecutors this way with the full weight of judicial authority. Prosecutors should be just as careful when leaning on the rest of us.■

# 60 MINUTES

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Mike Wallace, Morley Safer, Harry Reasoner, Ed Bradley and Diane Sawyer

"THE PERFECT COP" – Produced by Jim Jackson

"THE OTHER TINSEL TOWN" – Produced by John Tiffin

"U.S. vs. KILPATRICK" – Produced by Ira Rosen

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## "U.S. vs. KILPATRICK"

MIKE WALLACE: Tax shelters--they may not be cut out, but they're sure to be cut back if the Administration succeeds in getting a new tax code. Tax shelters are also what this story is all about, the U.S. versus Kilpatrick. Last year, Americans sheltered $20-billion of income, twice what they did two years ago, and maybe that's why the Justice Department and the IRS were so zealous in going after William Kilpatrick, a Denver promoter, who sold what he and his attorneys thought were perfectly legal tax shelters, like others in which people avoid income taxes by putting money in an IRA or tax-free municipal bonds, or by becoming a partner in oil or gas drilling. Kilpatrick says that three Justice Department tax attorneys were so intent on trying to put him in jail that they repeatedly abused their power.

WILLIAM KILPATRICK: I was guilty, make no mistake about it. I was guilty of everything they charged me with. I was also guilty of breathing, I was guilty of being alive, I was guilty of showing up in court--none of which is a crime, and neither is the things with which they charged me. But they destroyed my reputation, or tried to. They destroyed my business, and stated, "We may not be able to put Kilpatrick in jail, but we can break him, and we intend to."

WALLACE: Kilpatrick's tax shelters were in coal and methanol research. These are some of the plants he financed with investors' money. The investors in turn got big tax write-offs for the start-up money they had put in.

Attorney Jim McKennea is one of the Congress's leading investigators into tax collection abuses allegedly committed by the IRS against U.S. citizens.

JIM McKENNEA: Kilpatrick was selling tax shelters. He wasn't selling Bermuda sea grass. He was selling coal investments. When they were looking for alternative fuels, he was selling hydrogen, things which Congress had in fact enacted to direct investment in that direction. The IRS has a different set of values. They don't like that policy, so they ignore it. Kilpatrick's caught in the switches because the IRS has decided they're going to shut down on tax shelters of any kind. These were the most clean-cut legitimate kind.

WALLACE: Kilpatrick says he did everything he could to make sure his tax shelter was legal.

KILPATRICK: What on earth is going on? I spent a million eight hundred thousand dollars in legal fees before we ever put a project on the streets. Is this legal? Is this what the government wants? Are we in compliance with it? But it comes back, and you say, well, what happened to my attorneys? What did I spend all that money for? I could put an illegal program together on Saturday afternoon all by myself.

WALLACE: Among those who okayed Kilpatrick's shelters were several prominent tax attorneys, including Bob Grossman, a former Justice Department Tax Division prosecutor.

Did the government know that this Kilpatrick tax shelter scheme was legal, in your estimation?

BOB GROSSMAN: I don't think they cared if it was legal or illegal. They were out, it appears to me, to get the promoter.

WALLACE: You paint a picture of, in this case, the Department of Justice and an IRS bent on making an example of a tax shelter promoter, just to scare other people from getting involved in tax shelters. Is that it?

GROSSMAN: That's the message. It couldn't be any clearer than that.

WALLACE: Robert Miller, the U.S. Attorney in Colorado, says that's not why the government went after Kilpatrick. He co-signed the indictment against Kilpatrick and his associates.

ROBERT MILLER: Well, I was satisfied that there was enough to charge him with. Whether or not it can finally be said that indeed it was abusive, is a question that remains to be decided by a jury.

WALLACE: You're not against tax shelters?

MILLER: No, I'm not against tax shelters that are according to the law.

WALLACE: And according to the law means--?

MILLER: That they're— that they're not-- they're not defrauding the United States government or anybody else in the process of setting them up.

WALLACE: And how do you defraud?

MILLER: Well, there are many different ways to do it. I've had some where— where— involving gold mines where (neither) the gold nor the mine was there.

WALLACE: Well, that's out and out fraud. I mean, that's—

MILLER: Yes. That's what I'm talking about.

WALLACE: Which is not the case in this one.

MILLER: No, it was not-- that is not the type here.

WALLACE: Kilpatrick's case was the flagship case in the government crackdown on tax shelters. Three Justice Department prosecutors handled it—Stephen Jake Snyder, Thomas Blondin and Jared Scharf. When the case finally went to trial, both sides said they expected it to last up to eight months. Instead, Federal Judge John Kane dismissed 26 of the 27 counts against Kilpatrick and the others in just half a day, ruling that Kilpatrick had committed no crime as charged. But it was the publicity generated by the indictment that had caused Kilpatrick to lose his business and file for bankruptcy.

That sent Kilpatrick to see his senator, Republican William Armstrong of Colorado, who looked into the case and concluded that the prosecutors had the grand jury stacked against Kilpatrick.

SENATOR WILLIAM ARMSTRONG: The grand jury, instead of being an impartial investigating body designed to-- to determine the truth of the questions that had been at that point raised against Mr. Kilpatrick or someone else, was turned into a-- a different kind of creature. Really, instead of being impartial, it was subverted into trying to find something to-- to bring against him.

WALLACE: A creature of the prosecutor?

SENATOR ARMSTRONG: Exactly.

WALLACE: Richard Birchall, a former Justice Department tax attorney, represented one of Kilpatrick's partners. Birchall says that Prosecutor Snyder tried to ply him with drinks to get him to reveal privileged information.

RICHARD BIRCHALL: They attempted to get me drunk in the Landmark Inn. I was to appear before the grand jury the next day. Rather than meeting at the Federal Building, which I thought was the proper place to meet, it was held in a bar.

WALLACE: Did he not accuse you of some sexual shenanigans?

BIRCHALL: Snyder was interested in sexual affairs that might have some bearing on the individuals involved so that they might agree to testify for him and. . . .

WALLACE: When the drinks and the pressure didn't work, Birchall claims that Snyder even threatened him with prosecution.

Mr. Birchall, you've said, and I quote you, "It was one of the worst investigations I've ever read about, heard about or seen, from beginning to end."

BIRCHALL: If I heard it once, I heard it a dozen times, that the purpose of this case was to put-- put certain people out of business, put them out of business.

WALLACE: Who told you this?

BIRCHALL: Mr. Snyder, on several occasions, told me that.

WALLACE: Another story--that of tax law professor Ron Hjorth of the University of Washington Law School, who testified before the grand jury that the Kilpatrick shelter was legal. Hjorth says that, after his testimony, he was bullied and threatened by Department of Justice attorney Jake Snyder.

PROFESSOR RON HJORTH: I don't know that anyone in my life has ever insulted my integrity before. I-- I was-- this is certainly the first time that anyone has done it to my face. It was a government authority that did it.

WALLACE: And it was Federal Judge Fred Winner who began to unravel what the government did to Kilpatrick--for it was Winner, 71 years old, who granted Kilpatrick a new trial after Kilpatrick had been found guilty of the remaining minor count in the indictment. Winner's reason? He wrote that the three Justice Department prosecutors, Snyder, Blondin and Scharf, were guilty of "repeated excesses" in the course of their investigation, including "browbeating" and "ridiculing" one witness and threatening another.

At the center of the dispute is a controversy about just what went on inside the grand jury room here in the Federal Courthouse in Denver. Kilpatrick and his attorneys allege that the Department of Justice prosecutors broke the rules--legal rules--and ignored ethical considerations in their zeal to get indictments against William Kilpatrick and his associates, the men who put [illegible]gether this massive tax shelter.

What's in it for Jake Snyder to go after Kilpatrick so hard?

McKENNEA: A scalp; it's a career chevron. They move up in the hierarchy. Instead of being hired by a 20-man firm when they leave the Department of Justice, they get hired by a 50-man firm. It's self-interest. It's what motivates the world.

WALLACE: And Senator Armstrong goes even further.

SENATOR ARMSTRONG: There is a-- a very strong appearance that they were just out to get Bill Kilpatrick, that somebody didn't approve of his business practices and tried to-- to put him out of business, whether or not there was a violation of the law.

WALLACE: These are the people who are supposed to be the guardians of the law.

SENATOR ARMSTRONG: Indeed.

WALLACE: This is the Reagan Administration's Justice Department. It seems so out of character. I mean, they profess one thing and act another. No?

SENATOR ARMSTRONG: Well, I think that, yes, I think you're right. This is-- it raises all kinds of terrible questions.

WALLACE: Through almost three years of grand jury investigation, Kilpatrick and his associates had all their business records subpoenaed and even had the IRS snoop through their office garbage. Yet another abuse: according to Judge Winner the Justice Department coerced witnesses against Kilpatrick to testify in exchange for a promise of immunity, a practice known as pocket immunity.

Sheila Learner was Kilpatrick's secretary. The prosecutors asked her for testimony against her boss. When she told them Kilpatrick had done nothing wrong, the prosecutors withdrew the offer of immunity and indicted Miss Learner.

KILPATRICK: The mere fact that you have to give someone immunity implies that maybe they've done something wrong and that maybe they are going to be-- have their character assassinated, have their integrity impugned, they're going to go to jail. They gave immunity to, what, 22 people; said, okay, we're going to let you off if you just help us get this crook. They had already seen what they could do to me. They could destroy my business, they can destroy my life, they can destroy my business connections, my business associations, get me thrown out of the banks in the United States. Doesn't take a card-carrying genius for the man standing here just hearing the words, "Okay, we'll give you immunity, if you'll just help us and tell us what we want to hear."

WALLACE: Federal Judge John Kane, who threw out 26 of the 27 counts in the case against Kilpatrick, has strong opinions about pocket immunity.

"Informal immunity," you write, "apparently is in widespread use by the Justice Department," which you call "a damnable practice".

JUDGE JOHN KANE: And that's my opinion, that it's a damnable practice. Two people involved in robbing a bank, and one of them receives no prosecution, no time, and the other one is prosecuted.

WALLACE: When Fred Winner, the other judge in this case, wrote his opinion that there was misconduct by the U.S. government, the Justice Department tried to suppress what he had written. But their strategy backfired, and the story ended up on page one all over the country, and the Justice Department reversed itself and apologized for trying to suppress it.

But after the Justice Department apologized for trying to suppress the opinion, the three Justice Department attorneys, Blondin, Scharf and Snyder, about whom Judge Fred Winner had written, went to an outside counsel to try to keep the judge's opinion from being published. When we asked the three of them to appear on camera, they declined, saying the Justice Department wouldn't let them. But recently one of the three attorneys, Jared Scharf, resigned from Justice and agreed to speak to us on camera. Then, however, he sent us a list of conditions under which he would appear, among them that he would have editing control over his own interview and that CBS would put up $25,000 in collateral to assure Scharf that his demands would be met. This time we declined.

In September of this year, after three years of trauma for Kilpatrick, the case finally wound to its conclusion.

Federal Judge John Kane dismissed all charges against all defendants and said the prosecutors had engaged in reckless and systematic distortion of evidence in convincing the grand jury to hand down the indictments.

At a recent news conference, U.S. Attorney General William French Smith was asked about Judge Kane's decision.

WILLIAM FRENCH SMITH: We do not think that the— based upon our investigation and inquiry so far, that the— that the language contained in that opinion is justified by the facts, but that is something that we are re— reviewing at the present time and we'll have something to say about later.

WALLACE: Nonetheless, Judge Kane continues to call the case a travesty and continues to say that the grand jury was nothing more than a rubber stamp.

JUDGE KANE: The purpose of a grand jury, from the time of the battle of Runnymeade, from the time of Magna Carta, has been to protect private citizens from— from governmental action and governmental interference.

WALLACE: And that government interference has taken its toll. Though Kilpatrick has won his battle against the government, he has filed for bankruptcy and closed down his business. But Kilpatrick was lucky, for he had the money to sustain a long legal battle.

How much do you think you've spent altogether on your defense?

KILPATRICK: About $3,750,000.

WALLACE: Really? Humph!

KILPATRICK: And that's the interesting part. You know, there's a lot of people in jail in the United States today because they flat ran out of money. I want the next bureaucrat that thinks about doing something like that I want him to think long and hard, "Oh, my God! What if I run into a son of a bitch like Kilpatrick that's not going to lay down and roll over and do it, and what if maybe he happens to have some backing to be able to stand up long enough to keep it from happening?"

WALLACE: Senator William Armstrong of Colorado has announced that he will hold Senate hearings next month to determine the extent of the Justice Department improprieties. Meanwhile, the Justice Department says it plans to appeal Judge Kane's decision to a higher court.

(Announcements)

## A FEW MINUTES WITH ANDY ROONEY

DIANE SAWYER: Tonight is a big one for Andy Rooney, one he'd really like to win.

ANDY ROONEY: The Super Bowl game is next Sunday, and this year it's being broadcast by ABC, opposite 60 MINUTES. So, it's sort of nice of me to mention it at all. But because a lot of Americans who aren't real fans watch the game, I thought it might be a good idea for me to explain some of the phrases you'll be hearing from the game announcers. When you hear one of them say, "This is a passing situation," he means it's third down. When he says, "This is a kicking situation," it's fourth down. "He was really hammered." "Hammered" is this year's word. It means that someone was blocked or tackled. "Shaken up." When they say someone was shaken up, it means the man lying on the field probably has a broken leg or a dislocated shoulder. When a player is hammered, he's often shaken up. "That's a smart move by the coach." Here, the announcer is either a former player or a former coach, and he wants you to know he understands the game better than you do. "He lost his concentration." The receiver dropped the ball. "He's an underrated player." This doesn't really mean anything; the announcer's just filling time. "He has great hands" means he can catch the football.

"This game is far from over." This means that the game really is over. It's in the fourth quarter, there's still nine minutes to play, but the score is 37-to-3 and the trouble is they have 14 commercials they want to show you; so, they don't want you to leave. "What a year this young man has had." This doesn't mean much, either. Don't forget, they're going to be on for six hours next Sunday, and they have to keep talking. "That's a ball that never should have been thrown." They say that when there's an interception. "I'll bet he'd like to have that one back" is another way of saying the ball was intercepted. "The clock continues to run" means, of course, that the clock is running. And "Flags are down all over the field." The officials have seen one of the players violating the rules. So, there you have it. I hope this little explanation makes it more enjoyable for you to watch San Francisco beat Miami next Sunday, but don't go away. The clock continues to run and this show is far from over.

## LETTERS

DIANE SAWYER: Most of the mail we got this week was about the University of Texas student who was accused of child abuse and then cleared by a grand jury. One viewer wrote: " . . . Our society has suddenly come full circle, from total disbelief of a young child's accusations to blind acceptance. . . . "

But there were also letters like the one we got from a doctor who runs a sexual abuse treatment team. " . . . We are appalled that 60 MINUTES--an otherwise progressive program--has returned to the dark ages . . . We would be glad to educate you concerning the ramifications of a molested child not being believed. . . . "

About our story on Andreas Papandreou, the prime minister of Greece, a viewer wrote: " . . . It doesn't matter if he occasionally tweaks our pride. He's doing what he feels is in the best interest of Greece. . . . "

But there was also this: " . . . Clearly, Mr. Papandreou's abrasive political style is not born of patriotic concern . . . but of political consumption. The idea of pushing the U.S. around inflates the Greek ego like few other things can. . . . "

I'm Diane Sawyer. We'll be back next week with another edition of 60 MINUTES.

(Announcements)

(Excerpt from "The Other Tinsel Town" segment, during production credits)

(Announcements)

(Excerpt from "The Other Tinsel Town")

ANNOUNCER: Ciskei, where black South African workers are forced to live and children go hungry.

WOMAN: In many instances children vomit bubbles in the school because they have nothing in their tummies.

ANNOUNCER: Ciskei, created by South Africa, ruled by intimidation and military force. The story, tomorrow on the CBS EVENING NEWS WITH DAN RATHER.

ANNOUNCER: This is CBS.

Senator ARMSTRONG. Judge Kane makes the point that IRS agents appear before the grand jury without supervision, and he raises the question of confidentiality, which we have talked about; extensive access to materials generated by the grand jury was allowed, again a matter we have been discussing; the grand jury investigation was improperly used to get information from subsequent intended civil tax enforcement; the prosecutors of the case were reported to be rude, arrogant, and obnoxious; the prosecutors and IRS agents frequently released information about the grand jury investigation and targets in violation of Federal rules of criminal procedure; the prosecutors required grand jury witnesses to keep appearances before the grand jury a secret, the violation we talked about earlier which would seriously compromise the role of an attorney.

He mentioned the point of pocket immunity. The prosecutors apparently ignored entirely the Federal immunity statute. In his opinion, at least according to my notes, the Government acquired grand jury testimony from 23 witnesses by means of informal grants of immunity through letters of assurances that the witnesses would not be prosecuted. These grants were also known as pocket immunity. No witness, apparently not one of this group of witnesses at least, was ever granted statutory immunity nor was any attempt ever made to get it for them. It was all on the basis of informal proceedings. Also, it is noted the prosecutors gave confusing signals to the grand jury about the effect of the pocket immunity. The prosecutors gave witnesses with pocket immunity conflicting instructions as to their rights against self-incrimination when appearing before the grand jury.

I don't want to put words in your mouth, but just for the record of this proceeding, I note that you seem to be nodding your head in agreement.

Judge WINNER. Yes, sir. I agree with everything you have said, sir.

Senator ARMSTRONG. That is what happened?

Judge WINNER. Yes, sir.

Senator ARMSTRONG. Fourteen. The prosecutors used pocket immunity to pressure witnesses to testify favorably for the Government?

Judge WINNER. Absolutely.

Senator ARMSTRONG. Fifteen. The prosecutors called witnesses before the grand jury who had not been issued pocket immunity to invoke their fifth amendment privilege to prejudice the grand jury. Seven witnesses were called to invoke their privilege against incrimination. The court concluded, and this is Judge Kane, and I quote:

> The purpose was to prejudice the grand jury against the targets and the tax shelter transactions under investigation and not to lay a statutory predicate for immunizing the witnesses, which the prosecution never did.

I am not particularly asking you to comment on that since it wasn't in your opinion; but obviously, that is a matter that I would want to take up with the Department.

Judge WINNER. Yes, sir.

Senator **Armstrong**. And I am assuming that somebody from the Department of Justice is here this morning, and the fact that I am laying out the things that I am going to be asking the Assistant Attorney General next week just emphasizes that we are not trying to surprise anybody. We are not trying to sandbag anybody. We just want to know what is going on and what steps have been taken to assure that this is not a widespread practice.

Judge Kane says the prosecutor threatened and intimidated grand jury witnesses during a recess of the grand jury but in front of some of the grand jurors themselves.

Judge, what else should we be thinking about this morning? You have been generous with your time, and I have about elicited from you what I had hoped to get, which is an overview of the case we are going to hear tomorrow. I don't know if you have had a chance to look at the schedule, but tomorrow the committee is going to have a number of witnesses. We have deliberately asked only you to testify today, but tomorrow we are going to hear from Mr. Kilpatrick, Mr. Grossman, Mr. Waller; and then a panel of authorities on the grand jury process because that is so much central to this. But before we conclude this morning's hearing, is there anything more that we ought to bring out?

Judge **Winner**. I really can't think of anything, Senator. I am sure that it is impossible to legislate a perfect world. The Department of Justice in my opinion is doing a good job, but it has its problems on occasion. I know that a substantial segment of the bar advocates permitting counsel to be present in the grand jury room with a witness. That has been tried in many States. It seems to be working.

That is something I am sure you will hear more from, from members of the bar.

Senator **Armstrong**. Judge, we have tried to go out of our way this morning, and as we have developed material that provides the background for this, not to fly off the handle.

I am not interested at all in being unduly critical of the Justice Department or anybody else; but I must admit that the number of instances that have come to my attention that appear to be flagrant abuses of prosecutors' offices are a great concern to me.

As I pointed out at the beginning, we have deliberately just thrown out for the purposes of this hearing everything that isn't documented in some court proceedings. In other words, anything that was just whispered to me, and I have had some juicy stuff whispered to me, and phone calls from colleagues of mine in the Congress and former colleagues involving themselves and others—all of that we have just thrown out. We have said we are going to look only at what has been documented in the conclusions of courts of competent jurisdictions, and that record is a pretty unpleasant sight to behold.

You are familiar, of course, with the *Kilpatrick* case that we focused on, but there is the issue of Government agents encouraging theft from the mail, a case of altering documents, and in that episode involving an attorney who had previously been involved in a similar episode a few years earlier. The question is, What are we doing about it? What is the Justice Department doing about it? And are the rights of citizens adequately protected?

And I am not at all sanguine about your observation this morning about the investigations by the OPR. Now, you were careful not to say anything of your own first-hand knowledge, but you said that it had kind of come to your attention that OPR had looked into this and decided that there was no misconduct, but they never asked you about it.

Judge WINNER. No, sir.

Senator ARMSTRONG. And as far as you could tell, they didn't ask reporters about it and they didn't ask anybody else about it, and maybe it never happened. Maybe they haven't concluded anything, but you can bet I am going to ask them about that on Monday.

Oh, there is one other matter that I ought to raise. One of the things that was a source of great surprise and concern to me was, after your opinion was published, the Justice Department attempted to keep—after you had issued your opinion, the Justice Department had tried to keep your opinion from being published. Is that something that has happened to you a lot of times over the years?

Judge WINNER. No, sir. That has never happened to me, and I believe it has never happened to anyone else.

Senator ARMSTRONG. And it was subsequently published. The Justice Department asked the tenth circuit to suppress it?

Judge WINNER. Well, it is in a kind of limbo now. It was in an advance sheet, but it was not in the bound volume. Then the tenth circuit lifted the stay order, and it finally crept into a bound volume. However, I am not sure whether—I haven't paid any attention to it—so I am not sure whether the matter is being pursued by the named lawyers or whether it is being pursued by the Justice Department, too.

But they are still trying to suppress the opinion which has already been published. And the tenth circuit hadn't decided it yet.

Senator ARMSTRONG. You mean that even as of today, they are attempting to do that?

Judge WINNER. Well, that case is still pending. I don't know how they are going to work it out. I don't know what they can do about it, but they have not dismissed that case, and it has been orally argued.

Senator ARMSTRONG. How many other times are you aware of that the Justice Department has sought to do this?

Judge WINNER. I think this has got to be the one and only time.

Senator ARMSTRONG. You never heard it before?

Judge WINNER. No, sir.

Senator ARMSTRONG. I must admit that it took me by surprise. May I say that my colleague, Senator Grassley, has asked that if he were to submit some questions to you in writing if you would respond?

Judge WINNER. Sure. I would be happy to, sir.

Senator ARMSTRONG. It seems that so often we try to be in two places at once, but he has some questions he would like to pursue with you.

Judge WINNER. Sure.

Senator ARMSTRONG. I would like to ask about one other matter. We have been talking about the Office of Professional Responsibility. Is that right, or is it the Office of Professional Review?

Judge **Winner**. I think it is the Office of Professional Responsibility, but I am not absolutely sure. I have never had any experience with them.

Senator **Armstrong**. That is the Justice Department's inhouse——

Judge **Winner**. That is my understanding.

Senator **Armstrong**. What is the responsibility, if any, or the authority, if any, of State bar associations with respect to Federal prosecutors? In other words, if they see something going on, do they have a——

Judge **Winner**. I would say none.

Senator **Armstrong**. In other words, if an attorney from Washington, a Federal prosecutor comes out to Colorado, and if he really gets caught with his hand in the cookie jar, it is not——

Judge **Winner**. I don't think so. I have never really looked into it, but I would doubt it.

Senator **Armstrong**. So, the OPR is the proper——

Judge **Winner**. But of course, I believe that every Federal court has its own committee that imposes discipline. In Colorado we have a committee. We call our committee the committee on conduct, and I believe that committee would clearly have jurisdiction over a Federal prosecutor; but as I mentioned, I elected not to refer to them because I had been informed that it was going to be handled within the Justice Department, and I thought that was more appropriate, and I still do.

Senator **Armstrong**. My last line of inquiry, Judge, is related to the *Omni* decision. Have you read that decision?

Judge **Winner**. I read it this morning, sir.

Senator **Armstrong**. I don't want to ask you something that you don't want to get into since that is not a case you were directly involved in. Do you have any observations about that? Or is that something that you would like to leave for others to look at?

Judge **Winner**. I thought it was a very well written opinion.

Senator **Armstrong**. I share your opinion that it is a well written opinion. The essence of it is to explain that lawyers for the Government altered some documents, and they got caught doing it and said that they had altered them in order to enhance their accuracy. I don't know if that is like revenue enhancement, which is a term we have heard around here for some time.

But I am sort of like Will Rogers in that respect; I only know what I read in the newspapers, and that is how that case came to my attention. One day I read it in the newspaper, and I couldn't believe that they would say that the reason that they had altered these documents was to enhance their authenticity.

But I think that what I recall—or one of the issues that I recall—is there was a question as to when a certain note was made and whether or not the prosecutor's notes were contemporaneous notes, which would have more standing than something that they cooked up long after the fact.

Come to find out that the watermark on the paper indicated that the paper had been manufactured a year or so after the date that was shown on the paper for these notes having been made. So, we are going to get into that as well.

Judge, I thank you for taking your time and trouble to come here and do this. I don't know what is going to come of it; but either we are going to clear the air or we are going to have some legislation or we are going to do something to try to set this right.

Judge WINNER. Senator, I have only one thing that I mentioned to a member of your staff. It might be of help for you to have available a copy of the docket sheet out of the clerk's office in the *Kilpatrick* case. I have brought that with me and I will be happy to leave it with the committee. If you get into any discussions of dates, that is the official record of when what happened. And I do have that if the committee would like to have it.

Senator ARMSTRONG. We are very grateful for that. That was most useful.

Judge WINNER. Yes, sir.

Senator ARMSTRONG. And then, of course, the opinions we have been talking about: your opinion, Judge Kane's opinion, the *Omni* opinion, and the other matters we have discussed will also be included in the record.

Judge WINNER. I will say that the docket sheet will convince you that the clerks can't spell. [Laughter.]

Senator ARMSTRONG. Thank you, Judge.

Judge WINNER. Thank you, sir.

[Whereupon, at 11:40 a.m., the hearing was recessed, to be reconvened on Friday, June 20, 1986, at 10 a.m.]

# OVERSIGHT OF IRS AND JUSTICE DEPARTMENT PROSECUTION OF SEVERAL TAX CASES

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FRIDAY, JUNE 20, 1986

U.S. Senate,
Subcommittee on Oversight
of the Internal Revenue Service,
Committee on Finance,
*Washington, DC.*

The subcommittee met, pursuant to recess, at 10 a.m., in room SD-215, Dirksen Senate Office Building, Hon. Charles E. Grassley presiding.

Present: Senators Grassley and Armstrong.

[The opening statement of Senator Grassley follows:]

### Opening Statement by Charles E. Grassley

I would like to welcome our distinguished witnesses today to the second day of hearings on the subject of prosecutorial abuse in criminal taxpayer cases, before the Finance Subcommittee on Oversight of the Internal Revenue Service.

Yesterday, we received excellent testimony from Judge Fred Winner who gave us an objective overview of the subject matter and set the stage for the following days of hearings.

Today, we will receive testimony from the defendants and the defendant's bar point of view on prosecutorial abuse in taxpayer cases. I would request that each witness give us a brief oral summary of his written testimony before questions.

I look forward to today's testimony as our examination of this issue continues.

Senator **Grassley**. I am Senator Chuck Grassley, from Iowa. I am a member of the Subcommittee on Oversight, and I am sitting in for the chairman today, Senator Bob Dole, who, because of other obligations as floor leader and because of the tax bill on the floor of the Senate, is unable to preside over these very important hearings.

I would like to take this opportunity to welcome our distinguished witnesses as well as anybody in the audience interested in this subject.

Today is the second day of hearings on the subject of prosecutorial abuse in criminal taxpayer cases. As I said, this is before the Finance Subcommittee on Oversight of the Internal Revenue Service.

Yesterday we received some very excellent testimony from Judge Fred Winner, who gave us a very objective overview of this subject matter, and he also set a stage for the following days of hearings—this hearing, and then one hearing next week.

Today we will receive testimony from the defendants and the defendants' bar point of view on prosecutorial abuse in taxpayers' cases. I would request that each witness would give a brief oral summary of his written testimony before questions are asked. We would also state, as a matter of procedure not only for this subcommittee but most subcommittees in the Congress, that the entire written statements of witnesses would be printed in the record. The record will remain open for about 2 to 3 weeks, giving an opportunity for the correction of any part of the testimony as well as the fact that not everybody on the subcommittee can be here, and for that reason we would ask witnesses to expect questions in writing; like, for instance, yesterday I submitted questions in writing since I was detained elsewhere, because I had a bill up before the Senate Judiciary Committee.

So at this point, then, I would call on my colleague and a person very responsible for these hearings being held, and also a person who has committed a great deal of time both for himself and his staff to the issues before this subcommittee, Senator Armstrong of the State of Colorado.

Senator **ARMSTRONG**. Mr. Chairman, thank you very much. I have been looking forward for some time to this opportunity to hear in an official way and on the record from Mr. Kilpatrick.

I mentioned to the committee yesterday the number of contacts I have had with Mr. Kilpatrick, and this morning may I say to him that I am redeeming a promise I made a couple of years ago when I told you that I was unable to intervene in the legal process, but that if events turned out as you said they would—that is, if it turned out that the courts found you had been indicted for a crime that did not exist, and so on—that I would try to do what I could to set it right after the fact.

So, that is the business of this subcommittee—not particularly in support of Mr. Kilpatrick, because, as I pointed out yesterday, he has amply shown that he can defend himself, but in the hope that we can learn something from the experience he has had and make a determination of whether or not other taxpayers are put in the same situation, and if so, what legislative or administrative reforms, if any, may be needed.

So, Mr. Chairman, I appreciate your courtesy, and I am looking forward to the testimony this morning.

Senator **GRASSLEY**. Senator Armstrong, besides announcing Mr. Kilpatrick, Mr. Grossman, and Mr. Waller as members of the first panel, and that Mr. Kilpatrick is president and owner of United Financial Operations of Littleton, CO, and that Mr. Grossman is a senior partner of Grossman & Flask here in Washington, DC, and that Mr. Waller is an attorney with Waller, Mark & Allen, Denver, CO, I have no further introductions. Do you have a further introduction of any of the witnesses?

Senator **ARMSTRONG**. No; I'm ready to go.

Senator **GRASSLEY**. All three of you that I have announced as members of the panel, would each of you come together, simultaneously, to the witness table? Then I would ask for Mr. Kilpatrick's statement. Then, from there, Mr. Grossman, and then Mr. Waller. We would have each of your testimony, in that order, before we ask questions. So, if you would just be seated, please, and then immediately proceed; except maybe to pull the microphone in front of you, so that you speak directly into it.

Would you proceed, Mr. Kilpatrick.

## STATEMENT OF WILLIAM A. KILPATRICK, PRESIDENT AND OWNER, UNITED FINANCIAL OPERATIONS, INC., LITTLETON, CO

Mr. KILPATRICK. Thank you, Mr. Chairman, and members and staff of the Oversight Subcommittee. I particularly thank you, Bill, for the support you have given me through the years, both mental and physical courage, and I particularly thank you for something you pointed out this morning. It is gratifying to know that the Members of our Senate and our Representatives are in fact true to their word. When the opportunity does present itself, they do step forward.

I don't think, perhaps, I am the most important thing here. I think what is important here is that the subject before this committee is very critical to our survival as a free nation, in my opinion.

At first blush, that may appear to be an overstatement; but then, when you look at what has happened to me in the past 9 years, I think it perhaps is an understatement.

The culmination of this 9 year horror story occurred in September 1982, when I was indicted for a crime that does not exist. What I was doing was not a crime; it was tantamount to being accused of being alive, of breathing, of being an American citizen, but couched in such ugly verbiage by the Department of Justice and the IRS that it was made to sound like a crime. And by that charge, I was held hostage for 140 years of my life—a potential incarceration of 140 years—for a crime that was never committed, because the act is not a crime.

It could almost be funny. I suppose maybe 10 years ago I would have laughed at such bureaucratic bumbling; but 9 years, $6 million, witnessing the destruction of my company and the tears of my family later, I have somehow lost some portion, perhaps, of my sense of humor.

Now I want to know why. Now I want to know how this sort of thing happens. I want to know what is being done to assure that such atrocities do not occur to other Americans.

Others less fortunate than I have been convicted of the very crime that I have been accused of, of not commiting a crime. Others, in fear of the awesome power of Government, have actually copped pleas, and in plea bargaining have confessed to the guilt of a crime that does not exist. And some have even served time in prison.

I appear before you today in a coat and tie rather than in a prison uniform for one reason: I was blessed. The Lord blessed me with a wife and children, a family that loved me, who believed in me, who would stand by me. I was blessed with business associates of sufficiently long standing who had no reason to distrust me, and they too stood by me. I was blessed with a body that didn't succumb to heart disease, cardiac arrest, ulcers, or stroke. Most of all, I was blessed with $6 million—the amount of money that it takes to stand up to the awesome power of Government.

I would suggest to any American that, if you are short any of those blessings, you get real worried right now about what is going on in the name of tax collection in the United States today.

That is not the way America is supposed to work; but that is exactly how it works when the IRS and the Department of Justice Tax Division come calling. And that begs the question, "How?" How could this happen to citizens in this supposed bastion of freedom, in this land of adherence to the Magna Carta, the Constitution, and the Bill of Rights?

I can tell you, because I lived it. I was in the capital-formation business, the tax shelter business. My investors developed coal in response to the energy crisis. We did millions of dollars in research and development for liquefaction and gassification of coal.

At this point I would like to get something straight: There is nothing wrong with tax shelters. They are not created by evil men in smoke-filled rooms, with green eye shades, shiftily sneaking around; they are created right here in the hallowed Halls of Congress for very good reasons. Be they rightly or wrongly conceived, they are created right here, and we in the tax shelter business do absolutely nothing that Congress does not with their creations to induce us to do.

In 1977 I presumed that when the Congress passed such a tax bill and the President signed it into law, that the bill said what it meant and meant what it said. I presumed that if the combined wisdom of 535 Members of Congress and one President decreed that the energy crisis was of sufficient magnitude that it was worth giving particular tax advantages, therefore, that the investors that invested in these things and put money into it would receive the tax benefits that they were promised. As I said, I presumed Congress said what it meant and meant what it said, and I was defrauded.

Together with 1,700 of my investors and thousands of other American citizens, I was defrauded—not by a misguided individual but by the planned, predetermined efforts of the Internal Revenue Service. The plan was conceived at the top, directed by middle management, and implemented by the field workers. To promise a future benefit, a tax deduction, in return for a present act—our investment—with no intention of delivering that future deduction is a fraud, and we were defrauded.

If David Stockman never comes up with another true statement in the future of the world, David Stockman was right when he said, "If employees of government were held to the same standards that we hold the citizens, we would probably all be in jail."

But of course, that is not how it works. The way it works is, the IRS commits the crime and, if the citizen victim objects, it puts him in jail. That's right: Through the IRS, we the victims are framed for the very crime the IRS commits.

I was the defraudee. I was the party defrauded. It was me that was indicted. But that is not the worst part; the worst part is, I am not even unique.

The prosecutors actually bragged that I was their flagship and that, when they got me, the rest would fall. Who were the rest? Supposedly, the other 17,000 that they have listed, which are now either indicted, in prison, or under investigation, that were also in the tax shelter business.

Both the Federal judges in my case, Judges Kane and Winner, have stated that this is actually a pattern. I say it is worse than a pattern, I say it is beyond being just a pattern; it is pandemic. It runs all through the IRS and through the Department of Justice. In fact, the Department of Justice actually pleads it in their pleadings, that it does it all the time.

The only thing that is unique about my case is that we had enough time and enough ability to stay in line and to stand there. We had the $6 million necessary to bring out documents that most victims never see, to bring out testimony that most victims would never hear.

This all began with an amazing document entitled "Request for a Grand Jury," from one of the top men in the IRS to one of the top men at the Department of Justice, Tax Division, both of them attorneys, both of them admitted to the bar, and both of them devoid of the excuse that they didn't know it was in violation of the law, because ignorance of the law is not an excuse available to an attorney.

The document was entitled, "Request for Grand Jury." The first 10½ pages of that amazing document explained in detail, interspersed with a lot of legalese, how it is that they have spent several years trying to find something wrong with the tax shelters that we had created. At the end of that time, when they could find nothing wrong with it, they came to the last 4½ pages, entitled, "How To Use the Criminal Grand Jury," in order to collect the civil taxes. You can't use the criminal procedure, or you are not supposed to, for civil taxes. But they did.

For the next few years, the lesser men in the field who were engaged with more mundane things, little things like placing agents in the jury, IRS agents in the jury, tricking defense witnesses into not coming by thinking their testimony was no longer needed, issuing arrest warrants for other witnesses who were planning to come to testify for me, leaving it to the U.S. Customs for their arrest if they attempted to enter, threatening other witnesses that attempted to enter with loss of job and incarceration if their testimony was displeasing, violating first amendment rights by gagging judges and the press, bragging that "I may not be able to convict Kilpatrick, but I can break him, and I intend to, because this case is going to make my whole career." Isn't that a wonderful thing for an employee of Government to say? And just plain making up testimony. If the facts don't fit, just make it up; tell the jury anything you want them to hear, and let's get this boy convicted.

Shredding documents favorable to my defense in the Embassy in San Jose, Costa Rica. Finally, putting me in jail for 22 hours with what I believe and I think the records show was in fact perjured testimony. I believe they got that perjured testimony by reducing the charge of a convicted felon for a $500,000 theft to a misdemeanor—does anybody here know how you commit a half-million dollar misdemeanor? By completely dropping the charges for 7 years of illegal flight to avoid incarceration, by reducing a 12-year sentence to—count them, folks—3 hours in Atlanta prison, in at 2 and out at 5. No probation, no parole, no requirements for reporting, no requirements for repatriation or return of the half-million dollars of ill-gotten gains, despite the fact that he is a wealthy man, and forgiveness of the income tax thereon, all for the purpose of getting the testimony that was characterized later by Judge Winner as "lying by the clock." The man couldn't remember his lines that he had been trained in and contradicted himself 11 times while on the witness stand before Judge Winner.

That is only 9 of the 102 crimes of the list that I am presenting to the panel today, of the 102 crimes committed by the IRS and the Department of Justice. They are not even the worst nine crimes; I haven't even mentioned IRS agents and Department of Justice attorneys bullying their way into a grade school and interrogating 7- and 9-year-old children. I haven't mentioned that one.

I haven't mentioned Department of Justice attorneys and IRS agents who were under sequestration orders not to talk to one another concerning their testimony, holding a meeting the night before they were to testify, and, when caught, saying, "Well, we were not talking about our testimony; we were just talking about the facts of the case," which begs the question, "What were they planning to testify to?" The nonfacts? Which is precisely what they promptly did.

They came in and stood up, looked us straight in the face, and lied. I know they lied, because I was a witness to the event that they were testifying to, as were dozens of other people, as was the clerk of the court, as was the recorder of the court who testified to the event totally differently from what the colluded testimony of the DOJ and IRS agents came out to be, and then had the gall to say, "Well, our testimony more closely matched up than the other people's testimony did; therefore, you shouldn't believe the other people's testimony." Of course the uncolluded testimony didn't exactly match. They didn't have a chance to collude. They could probably have gotten their stories just exactly right if we had violated the law, like DOJ and IRS agents did.

All these things we found out about in the transcripts of 23 sessions of the grand jury, that they attempted to withhold from us. They got caught. Two separate judges with three separate orders had ordered them to turn over all the grand jury documents. They tried to withhold 78. They got caught and finally turned over 23, and most of what we know here was contained in that 23 they tried to hide. Fifty of them we still don't have. Nobody knows what is in the 50 that are left, because they are lost. The Department of Justice agents charged with that responsibility lost the documents, they claim. Of course, that is a lie, too. We know that is a lie, because 2 years later, when they decided to appeal the decision of Judge Kane, they found a couple of statements in a couple of those documents that were favorable to them, and quoted from them by line number and page number. That would require a memory the like of which is not known to man today, or the presumption that they are still withholding those 50 documents, in direct violation of three separate court orders from two separate judges, in obstruction of justice. And you have to question what is in those 50 that they can't put out.

Let's think about something else. At least that 50 and the 23 sessions were transcribed under the presumption that the secrecy of the grand jury would protect them and nobody would ever know about it. Now 102 crimes later they did at least allow them to be recorded. That begs the question, what on Earth must have happened during the dozens of days in which the court reporter was instructed not to record what was going on? They now plead, "Oh, well, gosh, we were just reading to the grand jury." Well, maybe they were; but we will never know, will we? We will never know, because there is no record of it.

The recorder was still there; she was still on the payroll. The cost to the Government was exactly the same as if she had been recording, but she was ordered to turn it off. And we are left now with just the word of two perjurers. And I can say they are perjurers, because on the last day of the grand jury they went before the jury when they found out that the jury was not going to indict the Bank of Nova Scotia, or the president of that bank. They went before the jury and lied to them, provably lied to them, on the record where there is a record of it.

So, we are now supposed to take the word of these two perjurers that, "Gosh, nothing went on," which makes it curioser and curioser as to what it is that must have happened during that 50 pages or rather 50 sessions that they lost, and God knows how many sessions in which there is just no recording at all.

And this is all routine. That is the part that is upsetting. It is standard operating procedure. Don't take my word for it; take the IRS' word for it, take the Department of Justice's word for it. They have stated on the record, "We do it all the time; we do it in every circuit; we do it to all Americans." And if you don't want to take their word for it, they then call in senior officials, deputy attorney generals of the United States who take the stand and confirm that they do it all the time, that they too swore to it that "they do it all the time." And ultimately, the Attorney General of the United States went on "60 Minutes" and on camera stated that he didn't think that what they were charged with doing in this case was sufficient to have caused the dismissal of the indictment against me, which presumes that he must know they do it all the time and that he, too, must approve of them doing it, all the time.

If that is not enough, look at the appeal of the Department of Justice in *United States* v. *Kilpatrick*. Not once—not once in the 70 pages—did they deny committing any one of the 102 what I call "crimes." Not once. They just say, "We do it all the time." They seem to go further there: They seem to say, "Oh, we are the Department of Justice. We dispense justice; we are not subject to it. We do it all the time. We do it in all circuits. We do it to all Americans, and that proves that it is OK."

Well, I don't think it is OK. I don't think 235 million Americans think it is OK, and I don't think this Senate and this Congress think it is OK.

However, the IRS doesn't see anything wrong with it; therefore, they don't make any attempt at all to change the procedures, nor does the Department of Justice. I suppose the reverse would be true. If this Senate and this Congress don't force it to be stopped, I think the presumption must be that it, too, must approve of it; that it, too, must approve of prosecutors sitting in the jury, of tricking defense witnesses into not appearing, arresting them if they try, and threatening their jobs if they sneak through the barricades; that it, too, approves of the press and Federal judges being gagged if they say naughty things about Federal employees; that it, too, approves of the Government attorneys deciding to make their careers by putting innocent citizens in jail.

In fact, perhaps all Americans will recognize that apparently Congress would approve at that point in time of all 102 crimes.

In the next few days the Senate is going to hear their excuses, the same excuses they put in their appeals. I contend there are no excuses, and I would ask, as you listen to their attempting to explain and to excuse these acts, that you imagine being seated next to one of the framers of the Constitution, and listening to these perversions of the rights that they secured for us by defying God and king in 1776. And I would ask you to ask youself, "Would this excuse have sold in Philadelphia in the summer of 1793?"

After you have digested it all, I am sure you will act. I suggest that your shock at the level to which our freedoms in this Nation have degenerated in the interest of collecting taxes will cause you to act with strong action. I suggest it will require corrective actions of Congress, and that Congress supervise those corrective actions. I suggest it will require, at a minimum, the appointment of a special prosecutor empowered to reduce in rank, dismiss from Government service, request appropriate action from associations, the bar association, and in instances of flagrant acts, criminal prosecution.

I suggest that any less remedy would be instantly followed, upon the completion of these hearings, with business as usual at the Department of Justice and at the IRS.

I further suggest that while stopping these acts now is a meritorious event, the prevention of their recurrence is even more important. I think that will require a new law, one that permits the citizens of the United States equal access to the courts against the employees of Government that the Government has against the citizens, a law permitting us to sue an IRS agent or a Department of Justice agent if they break the law or violate the Constitution; because only then are we going to have real protection against violations.

The frequency of an oversight committee or a special prosecutor is not sufficiently frequent that it really instills any fear into would-be overzealous prosecutors or overly ambitious individuals that want to break those laws. And why not?

I am living proof that this Congress has seen fit for a citizen that so much as makes a mistake on his income tax, a civil mistake, to allow the IRS to collect the mistake, plus interest on the mistake, plus a 100-percent penalty on the interest and the principal; and then, the IRS has added to that approximately 140 years potential incarceration, if you make a mistake, and perhaps in some instances where you don't even make one. Why should public servants be held to any less standard—they should be held to higher standards, I might add—than that to which the citizens are held?

When the citizens have that sort of recourse that will get their attention. At that point in time the IRS agents and the Department of Justice agents will realize that they, too, can be sent to jail; they, too, can lose their jobs; they, too, can be broken financially by illegal and unconscionable acts.

In summary, I think it is time for a change. I think 102 criminal, oppressive acts—later, it becomes a little bit difficult to still adhere to the theory that the "king and the king's men can do no wrong," and therefore you cannot sue the king. One hundred and two acts later, it must be obvious that the king's men are doing wrong, and that the king's men will continue to do massive and grievous wrongs until this committee, this Senate, and this Congress say, "No more." I think it is time to return corrective actions and measures to the hands of the citizens of the United States. I think it is time to guarantee that our public servants know that they, too, are subject to the laws of this land. I think it is time that we obey the intent of the Constitution.

That is what I think, and that is what I think all Americans think. In the next few weeks we are going to find out what this Congress thinks.

Thank you.

[Mr. Kilpatrick's written prepared statement follows:]

## STATEMENT OF WILLIAM A. KILPATRICK, TO SENATE FINANCE OVERSIGHT SUBCOMMITTE ON INTERNAL REVENUE TAXATION

Ladies and Gentlemen, I thank you for the opportunity to speak on a subject I believe to be critical to our survival as a free nation. At first blush that may appear to you to be an extreme statement. To the contrary in consideration of my experience with our tax system over the past 9 years I believe it to be an understatement.

The culmination of this nine year horror occurred in September, 1982 when I was indicted at the request of the IRS by a grand jury whose powers had been unconstitutionally usurped by the Tax Division, Department of Justice. I was indicted for a crime THAT DOES NOT EXIST. I did what I was accused of doing but its not a crime, it was tantamount to being accused of breathing, of being alive, of being a citizen but couched in such ugly terms by the IRS and DOJ. That it was made to appear to be a criminal. By that charge I was held hostage to a possible sentence of 140 years, for a crime that was never committed. All in the interest of collecting taxes that were not owed.

It's almost funny and perhaps 10 years ago before my life was laid waste in this process I would have laughed at such bureaucratic bungling, but 9 years, $6 million in legal fees, witnessing the destruction of my company and the tears of my family later I suppose I've lost a certain amount of my humor.

Now I want to know how.

Now I want to know why.

Now I want to know what is being done to correct such an atrocity in this nation because my experience is not an isolated event, to the contrary it is quite common. Others in this land have been convicted or in terror of the awesome power of the government have confessed quilt in plea bargaining to this non-crime. Some have served time in prison.

I appear before you in coat and tie rather than prison garb, for one reason. I was blessed!

The Lord blessed me with a wife and children that loved me, believed in me, and stood by me.

I was blessed with a body that survived the stress of the ordeal without succumbing to stroke, ulcers or cardiac arrest.

Probably, most important, I was blessed with the $6 million necessary to pay the legal fees to defend myself until the truth could come out.

I would suggest to any American that if you are short any of those blessings that you become very concerned about what is going on in the U.S. today in the name of Tax Collection.

That begs the question How? How could this happen to citizens of this bastion of freedom, in this land of adherence to Magna Carta, the Constitution and the Bill of Rights.

I can tell you, because I lived it. In 1977 I was in the capital formation/tax shelter business.

And at this point let's get something straight, tax shelters are not created by evil men, with green eye shades, in smoke filled back rooms - they are created with the best of intentions, rightly or wrongly concieved, right here in the hallowed halls of Congress. The only thing we people in the legitimate shelter business do is exactly what you pass laws to encourage us to do.

In 1977 I presumed that when the Congress passed a bill and the President signed it into law that the law said what it meant, and meant what it said.

I presumed that if the combined wisdom of 535 members of Congress and one President decreed that the energy crisis was of sufficient magnitude to warrant the granting of tax benefits to individuals investing in alternative energy, coal or research and development of coal for its conversion into a gaseous or liquid fuel that such investors in such endeavors would receive such promised tax benefits. As I said I presumed Congress meant what it said and said what it meant.

I was defrauded. Together with 1700 of my investors and thousands of other Americans I was defrauded by this government. Not by a misdirected individual, but by the planned systematic effort of the IRS. The plan was conceived at the top, directed by middle management and implemented by the field forces of the IRS. To promise a future benefit in return for a current act with no intention of delivering the future benefit is fraud and we were defrauded.

If Dave Stockmen is never right about another thing in his life he was right on point when the said, "If employees of government were held to the same standards as we hold the citizens, we would all be in jail."

But of course that is not how it works. The way it works is the government commits the crime and if the citizen victim objects, the government puts the victim in jail. That's right, through the IRS, we the victims are framed for the very crime the IRS commits.

And both of the Federal Judges in my case, Kane and Winner, have determined it to be a "pattern". I say it's worse, I say it's beyond just a pattern it is "pandemic", in the IRS and DOJ and the record in my case proves it.

That is the truly unique thing about my case is we were able to obtain documents that most victims never see. Those documents clearly demonstrate that it is a pattern, they reveal the 102 acts, the crimes that must be committed, the constitutional rights that must be violated and the rules of law that must be trampled in order to convict the victim of the government's crime.

It started with an amazing 16 page document from the head of the IRS Criminal Investigation Division (CID) to an Assistant Attorney General of the United States, entitled "Request for Grand Jury". The first 10 1/2 pages of this document explains how the IRS has been unable to find any way to deny my investors their legal deductions, and concludes with the admission, "...therefore, it must be obvious that it would be extremely difficult to make a case by civil or administrative methods". I might add the "civil method" is the only legal method available to collect "civil tax".

The last 5 1/2 pages are entitled, "How to use the Grand Jury". Those pages explain how the IRS wants the DOJ to illegally and unconstitutionally use the criminal grand jury to help it collect the civil tax dollars that the first ten pages had just demonstrated that the citizens didn't owe. If that is hard to believe read it for yourself. After you cut through the legaleze that is exactly what it says. The sender really wanted the receiver to perform an illegal act for an illegal purpose and illegally send me to jail in order to scare my investors into paying the taxes they did not owe.

For the next few years after these two senior IRS and DOJ officials jointly agreed to break the law and violate the constitution, their middle management and field workers were busy with more mundane duties, little things like;

1. Putting IRS agents in the Grand Jury as special agents,

2. Tricking defense witnesses into thinking their testimony was not needed, not wanted, and no longer requested (Quintella),

3. Issuing arrest warrants to U.S. Customs for other defense witnesses against whom no charges existed in order to make certain they didn't enter the US to testify (C.S., Gill, Alberga),

4. Threatening defense witnesses with loss of job and personal indictment if their testimony was displeasing (Bell, Hjorth, Birchal, 23 pocket immunity letters),

5. Violating the 1st Amendment by getting gag orders on federal judges to prevent publication of opinions unfavorable to the IRS (Winner),

6. Bragging "we may not be able to convict Kilpatrick, but we can break him and we intend to because this case will make my entire career (Birchal),

7. Making up testimony when the facts don't fit what they want to hear,

8. Shredding documents potentially favorable to me in the American Embassy in Costa Rica,

9. Putting me in jail for 22 hours with testimony they knew was perjured, because I believe they created the perjury themselves. I believe, and the record seems to prove, they exchanged it for reducing a convicted felon's $500,000 theft to a misdemeanor, dropping felony charges for 7 years of illegal flight to avoid incarceration, reducing a 12 year sentence to 3 hours in Atlanta prison, requiring no parole, no probation, no repatriation of the $1/2 million in stolen money and apparent forgiveness of the income tax thereon. And then standing before the judge and swearing that there had been no deal made to procure the perjourous testimony. I must add Judge Winner characterized that same testimony as "lying by the clock". The man contradicted his own testimony 11 times in less than a hour - he couldn't remember his lines. And that is only 9 of the 102 such acts, in fact its not even the worst 9. I haven't even mentioned IRS agents and DOJ attorneys bullying their way into a grade school to interrogate 7 and 9 year old children, or 3 Assistant US Attorneys and two IRS agents that were under a sequestration order conducting a meeting to collude on their testimony and when they were caught, protested they weren't discussing their testimony, that they were only discussing the "facts of the case". That of course begs a new question, "To what were they planning to testify, the NON FACTS", which is of course precisely what they then proceeded to do. In that instance they just lied. I know that because I was witness to the event as were dozens of other to include the court recorder and the clerk who testified to the event. My time before you is limited you'll have to read the remaining 91 for yourselves.

But as you do so I would like you to remember something; the perpetrators thought these 102 events would be protected in the Secret Grand Jury Transcripts that are normally not available to the victim.

We still don't know it all, because we still don't have the transcripts of over 50 sessions of the grand jury because the government claims they're lost. Most of what we know was discovered in 23 transcripts the perpetrators "attempted" to "lose" or "withhold" but had to produce them when caught. One must but wonder what must be contained in the 50 plus that are still supposedly lost. Of course we know that is a lie too. Their not lost, two years after the supposed "loss" the DOJ discovered something favorable to it and cited in its appeal of this case from two of the supposedly lost documents by page number and line number. That requires either the greatest memory known to man or the presumption that the lost documents are not lost at all but rather are still being withheld in flagrant contempt of 3 separate court orders from 2 separate judges in obvious obstruction of justice.

If most of what we know was in the 23 sessions they turned over, what must be in the 50 they are still hiding? Another question, what must have occurred during the dozens of days in which the court recorder was instructed not to keep a record? As bad as these 102 acts are, and as much worse as we can presume the hidden 50 must be, at least they were recorded. What must have occurred when the same IRS agents/grand jury agents/ and the prosecutors little helpers testified and ordered that no record be kept? The recorder remained in the room, she was on the payroll, the cost was the same to the government, but no record was kept. That event becomes curiouser and curiouser when we realize that these were the same agents that lied to the jury on the record to get the Bank & its President indicted after the jury disclosed it was not inclined to do so.

And this is routine - it's standard operating proceedure. Don't take my word for it, take the IRS' and DOJ's word for it. They state on the record, "we do it all the time, we do it in every circuit" and then called in senior officials, Deputy Attorney Generals, to confirm that they do it all the time. Ultimately Attorney General William French Smith stated on 60 Minutes that he concurs with the correctness of their procedures which must mean that he too knows they do it all the time.

If that's not enough look at their appeal in my case. Not once in the entire appeal do they even attempt to deny committing any one of the 102 acts, they just make excuses, they simply plead it's OK, we did it and it's OK. In fact the appeal, which had to be approved at the highest levels, seems to plead further, it seems to plead, "We are Tax Division, Department of Justice - we dispense justice, we're not subject to it. We do it all the time, and we get away with it all the time, that proves it's okay, to do!"

Well, I don't think it's okay and I don't believe 235 million Americans think it's okay. I trust 535 members of Congress don't think its okay either but I suppose we are going to find out.

I have presented you with the list of the 102 crimes. The DOJ and the IRS see nothing wrong with the acts so neither makes any attempt to stop such acts. I suppose the reverse must also be true, if the Senate Oversight Committee coesn't take measures to stop such acts we must presume it's because it sees nothing wrong with them either, and we will then know:

1. The Senate approves of prosecutors in the grand jury,

2. You approve of tricking defense witnesses into not appearing, arresting them of they try, and threatening their jobs and freedom if they don't say what the prosecutor wants to hear,

3. That you approve of the press and federal judges being gagged if they say naughty things about government employees,

4. That you approve of government attorneys deciding to "make their career" by putting innocent citizens in prison and if they can't put him there to use all the awesome power of the government to break the citizen as punishment.

In fact all Americans will know you approve of all the 102 events described in the list. Later during these hearings you are going to hear excuses, excuses for these acts of the DOJ and IRS. I've heard them all.

I suggest there are no excuses. The listed 102 crimes occurred with the results described therein. After hearing all the excuses, cites of case histories, rules of law, and loopholes which the IRS & DOJ will present, ask yourself what difference does it make? There is no excuse sufficient to negate the 1st, 4th, 5th, 6th, and 7th Amendments? If the law is violated, in order ot inforce the law, there is no law.

When you have digested it all, I believe you will act. I believe you will require corrections. If so you, I, and the world knows that no bureaucracy ever has, isn't now, and never will police itself, therefore any correction must come from you.

I suggest the minimum correction will require the appointment of an independent council to prosecute these admitted crimes. I suggest he be empowered to reduce in rank, dismiss from government service, or file criminal charges as he may deem appropriate. I suggest that any less is no remedy at all and will result in less than a week after the closing of this hearing, business will be "as usual" at the DOJ & IRS.

I further suggest that the only way to prevent it from reoccurring is to pass a new law, one that permits the citizens of this nation equal access to the courts against the government and its employees as the government now has against its citizens. A law permitting citizens to sue individual government agents if they violate the law and Constitution.

Only when every IRS and DOJ employee knows they too are subject to the laws of this land, that they too can be disbarred for illegal acts, that they too can be held liable for their acts, and in fact that they too can be incarcerated for their crimes will there be any real deterrent to the commission of these illegal acts. And why not?

If we citizens commit so much as a "civil" mistake on our civil taxes this congress has passed laws permitting the collection of the amount of our error, plus interest, plus a 100% penalty. Why should public servants, who should be held to higher standards, be held to any less.

When the citizens have recourse they will no longer need special investigators or prosecutors or Senate Oversight Committees. We'll handle the matter ourselves.

Ladies and gentlemen I think it's time for a change. I think admitted 102 crimes later that it has become more than a little difficult to swallow the "King can do no wrong theory".

I think it's time to place corrective measures in the hands of the citizens. I think it's time to assure our bureaucratic employees adhere to the law. I think it's time to obey our Constitution.

That's what I think. That's what I believe all Americans think.

I suppose in the next few weeks we are going to find out what this committee thinks.

## ADDENDUM ONE OF ONE TO

## STATEMENT OF WILLIAM A. KILPATRICK TO SENATE FINANCE SUBCOMMITTEE ON INTERNAL REVENUE TAXATION

## Listing of Violations

Statement of Fact: After three years of investigations using the legal (civil and administrative) procedures available, the IRS was unable to find anything wrong with the investment programs of my company. It could not, therefore, claim the deductions taken by my investors were anything but correct. You would think the investigators would simply declare it legal, deductible, and go look for some crooks. Wrong, they decided to break the law by violating my and several hundred other people's constitutional rights. They requested a grand jury to illegally accomplish the task, which could not legally be done.

The act was planned, and the agents knew it was illegal. So did each of their superiors who endorsed the plan, as did the top executives in the Tax Division, Department of Justice, who approved it and agreed to cooperate. Ignorance of the law was not a defense available to these lawyers, and each showed just that.

The amazing sixteen page document, which initiated this procedure, is included herein as the "Request for Grand Jury." The first ten and one-half pages list all the ways the IRS tried, to that date, to find something wrong. It describes what we did, admits our procedures were correct, and finally concludes it was impossible for the IRS to make a case using civil or administrative means. Which were the only legal procedures available to them.

The last five and one-half pages are entitled "Use of the Grand Jury." It details exactly the illegal acts the IRS desired the grand jury to perform and how the benefits of these illegal acts would be unlawfully used to accomplish the IRS's illicit goals.

Immediately following the "Request" is the signed agreement from the obviously misnamed Department of Justice, whereby it entered into an illegal conspiracy to accomplish unconstitutional goals. It is illegal and unconstitutional to use a criminal procedure to accomplish a civil purpose. The collection of taxes is civil. The purpose of a grand jury is criminal.

1. The IRS illegally requested an illegal criminal grand jury to illegally help collect civil taxes. (Proven in "Request for Grand Jury"). Violation.

2. The Department of Justice agreed to illegally perform the illegal services. (Proven in "Request for Grand Jury"). Violation.

Comment: The IRS, thus, began its illegal and unconstitutional efforts to acquire forbidden information, with the cooperation of the Department of Justice, Tax Division. The fact that none of the information developed by the grand jury proved valuable in making their case was irrelevant. It was the act, itself, that was important. It was their totally casual attitude toward disobedience to or ignoring of the law and their arrogation of an authority they were forbidden to possess.

That is frightening. This act cannot be justified nor forgiven, even if it had accomplished the conviction of a criminal that would otherwise have escaped. The law exists to prevent an oppressive government from abusing its citizens. The IRS did just that.

Statement of Fact: All grand jury records are secret. The law[3] requires they must be maintained in a separately locked room within the local U.S. Attorney's office. Access is forbidden even to other employees of the U.S. Attorney's office not engaged in the case. It is specifically forbidden to the IRS or any other third party. The party being investigated is not, yet, even charged with a crime, much less convicted of one. His reputation can be destroyed by just the publicity that he is being investigated, as in my instance. This is the purpose of the secrecy laws of grand juries. To the contrary:

3. Records were stored across the street from the U.S. Attorney's office. (Admitted). Violation - Rules for Grand Jury Procedures as stated in the U.S. Attorney's Manual and Rule 6(E), Federal Rules Criminal Procedure(FRCP).

4. Records were in an office rented by the IRS. (Proven by GSA records). They identified the intended illegal beneficiary of the procedure. Violation - FRCP 6(E).

5. The office was equipped with IRS telephones, paid for by the IRS. (Proven by GSA records). This further proved the identity of the illegal beneficiary. Violation - FRCP 6(E).

6. The office was staffed solely by IRS personnel. (Admitted) Violation - FRCP 6(E), the secrecy requirement of grand juries.

7. Special locks were put on the doors, and the only keys were maintained by IRS personnel. The U.S. Attorney did not even have access without IRS permission. (GSA records, admitted). Violation -FRCP 6(E). Identified the real user of the now illegally collected illegal information.

8. The door was routinely left unlocked and open, witnesses and other parties regularly walked in and availed themselves of the "secret by law" documents and invaded my privacy. (Testimony and court records). Violation - FRCP 6(E), as well as my Fourth Amendment rights to privacy in my affairs.

9. IRS civil personnel were used to perform audits on the bank accounts for civil purposes. The civil purpose was proven by their failure to ever present the audits to the criminal grand jury. Plus, the bank audits were valueless in relation to the charges against me. The IRS was forbidden such access with or without a grand jury. (Admitted). Violation - FRCP 6(E) and Fourth Amendment.

10. Seventy-eight IRS agents were documented as having been permitted full or partial access to the documents. (Admitted). Violation FRCP 6(E) and Fourth Amendment.

11. The IRS maintained the administration of all records at all times. (Admitted). Violation 6(E).

Statement of Fact: It was decided to computerize the records.

12. IRS personnel performed the entire computer programming procedure, thus gaining additional access. (Admitted). Violation 6(E) and Fourth Amendment.

13. The local IRS shared the documentations with Personnel from the Dallas and Ogden IRS offices and thus, further spread the illegally gained information. (Admitted). Violation - FRCP 6(E) and Fourth Amendment.

14. On completion, the program was placed on IRS computers. (Admitted). Violation - FRCP 6(E) and Fourth Amendment.

15. Only the IRS had computer code access, not the U.S. Attorney. (Admitted). Violation FRCP 6(E) and Fourth Amendment.

16. Every IRS agent in the U.S. had total and perpetual access to our secret records, which were forbidden to them. An inescapable conclusion, why else did they put it on the computer? (Admitted). Violation FRCP 6(E) and Fourth Amendment.

Comment: In total, this was a violation of my Fourth Amendment rights against unreasonable search or seizure of my papers and effects. Since the entire investigation was for illegal purposes, none of the subpoenas to acquire my documents attained the status of warranted. The continued disclosure also violated my Fourth Amendment right to privacy in my affairs.

Statement of Fact: A grand jury is supposed to be for the protection of the citizens against an oppressive government abusing its powers. Once empanelled, its authority is almost limitless. Regardless of the purpose of its calling, it can totally change the direction of its efforts and commence an investigation of the sheriff, the prosecutor, and even the judge that empanelled it. It can, in fact, indict them all instead of their target. It can even throw in indictments of the President, the Congress, and the Supreme Court for good measure, if it so desires. Its powers are vast and unsurpassed in our system, for good reason. It is for the citizens' protection, and it is the citizens' greatest barrier against any violation of their rights. The potential of such a run-away grand jury turning on the government is the subject of much concern in prosecutorial circles.

In this case, the IRS usurped those awesome powers and used the grand jury, not as an unbiased jury to protect the citizen, but as a porsecutor's tool to perform its investigation. The IRS,[6] together with the Department of Justice Tax Division, took the powers designed to protect the citizens and turned them against a citizen.

17. Two minutes after the judge completed the swearing in of the jury and departed from the room, the prosecutors added two IRS agents to the jury in the name of "Agents of the Grand Jury." (Grand jury records, admitted). They actually bragged about doing it, in every case, in every circuit, and to all Americans. It was a routine procedure. Violation - Fifth Amendment right to be indicted by an impartial grand jury of my peers.

18. The jury was informed that, since the IRS agents were the jury's agents, the jury could totally depend on them to be unbiased. They would help the jury reach a fair decision. (Records of the grand jury and admitted). Violation Fifth Amendment, Sixth Amendment, and perjury.

19. The agents were sworn in by the Assistant U.S. Attorney, who had no authority to administer an oath. The Assistant U.S. Attorney certainly had no authority to administer an oath for illegal purposes. (Admitted, proven by grand jury transcript). Violation - FRCP.

Comment: Grand juries do not have agents. They certainly do not have prosecutors as agents; and especially, they do not have as agents the very IRS agents that initiated the illegal request for the grand jury to attempt to accomplish illegally, that which they admitted could not be done legally in their "Request for Grand Jury."

Statement of Fact: Grand juries have severe limitations on who[7] may appear before them. They are (1) attorney for the government, (2) the sworn witness (one at a time, two witnesses may not appear together), (3) the recorder or stenographer, and (4) an interpreter, if necessary. No other party may ever enter the room, nor may any of the parties enter acting in any capacity other than in the above capacities.

20. The IRS agents routinely sat in on grand jury deliberations. (Records of grand jury). Violation - FRCP.

21. The IRS agents routinely testified TOGETHER before the grand jury. (Records of grand jury and admitted). Violation FRCP 6(d).

22. The IRS agents, at times, testified alone and together without being sworn in. (Records of grand jury and admitted). Violation - FRCP 6(d).

23. The IRS agents testified to having evidence which they obviously did not have, by virtue of the fact that the witness who supposedly conveyed the testimony did not exist. (Records of grand jury and admitted). Violation - Perjury.

24. The IRS agents testified to having evidence (testimony) from two witnesses that did exist, but that never, in their testimony, even alluded to the subject of the agents' testimony. Nor did the agents ask them any questions about it. (Records of grand jury). Violation - Perjury.

Statement of Fact: In order to acquire testimony from a reluctant witness, prosecutors in a grand jury may grant immunity to a witness in order to obtain that which might otherwise be unavailable. There is an exact statutory procedure that must be[8] used, called Statutory Immunity.

A. The prosecutor (i.e.,Assistant U.S. Attorney) in charge first must make the determination that its necessary to give immunity in order to obtain the testimony.

B. Certification must be made that the witness has refused, or is likely to refuse, to testify because of his privilege against self incrimination.

C. Prosecutors must then acquire the approval of the local U.S. Attorney for the district and his concurrence of the necessity.

D. The prosecutor and the U.S. Attorney must obtain further approval of not less an authority than the Attorney General of the U.S., a Deputy Attorney General, or an Assistant Attorney General.

E. A U.S. District Court judge must then perform the ministerial act of signing the order and memorializing the exact terms, limits, and purpose of the immunity.

F. A record must be kept for Congress, in order to determine if the extraordinary act accomplishes the effect desired and if the forced waiving of the Fifth Amendment right achieves sufficient beneficial effects to warrant the patently abusive procedure.

The purposes of this procedure are manyfold, not the least of which are (1) Congressional supervision, (2) Court supervision of the terms of the immunity and its correct fulfillment, (3) Court determination of the exact acts that are forgiven, (4) Court ascertainment of the validity of the prosecutors' reasons and the truthfulness of the testimony. (There is a strong potential that a party, subject to prosecution for a serious felony, might be willing to lie in order to acquire immunity), (5) Assurance that the prosecutor cannot badger a witness into perjurious testimony by threats of withdrawal of immunity, if the testimony is not sufficiently incriminating to the target, and (6) Certainty that prosecutors do not gain long term control over a witness by future threats of withdrawal of any unmemorialized immunity.

25. The prosecutors unilaterally issued letters of immunity by only their signatures. (Letters signed by the prosecutors). Violation - 18 USC #6002 and 6003.

26. No determination was ever made that any witness would have been any less willing to testify without the immunity. (Admitted). Violation - 18 USC 6002 and 6003.

27. U.S. Attorney was never even asked for approval and, in fact, was not aware immunity was being given. He certainly had not given his required approval. (U.S. Attorney testimony) Violation - 18 USC 6002 and 6003.

28. Letters were issued on stolen U.S. Attorney stationary, that the U.S. Attorney was unaware the agents possessed. (U.S. Attorney testimony). Violation - Theft and fraudulent use of government documents and 18 USC 6002 and 6003.

29. Letters were signed by the prosecutors on the U.S. Attorney's stationary, thus implying an approval and authority they did not possess. (The letters). Violation - Fraud and forged authority .

30. Neither the Attorney General nor his assistant were ever notified of the letters, nor did they give any approval. (Testimony of representative). Violation - 18 USC 6002 and 6003.

31. No judge was ever utilized; thus, no order of immunity[10] ever existed. (Statement from the bench by the only judge authorized to grant it). Violation - 18 USC 6002 and 6003.

32. No records were maintained; therefore, Congress lost its ability to supervise. (Admitted in testimony). Violation - 18 USC 6002 and 6003.

33. Threats of withdrawal of the immunity were made to witnesses when the testimony turned out to be favorable to the target's and not the prosecutor's case. (Records of the grand jury and the court hearings). Violation - Obstruction of justice by threats, badgering and intimidation.

34. the witnesses first offered immunity were indicted if their testimony was not "good enough" or if they refused to make up testimony to the agents' and prosecutors' liking. (Court records). Violation - Obstruction of justice.

35. Witnesses not given immunity were called before the jury and forced to take the Fifth Amendment, prejudicing the jury against them and the targets. (Admitted by prosecutors). Violation - Rules for Grand Jury Procedures.

Comment: Every single procedure intended to ascertain the correct use of Statutory Immunity was avoided, and the exact abuses the procedures were designed to prohibit were then committed by the numbers by the prosecutors. One such witness, who succumbed to the threats, was described by the judge as "lying by the clock." He couldn't remember his story line, and he contradicted himself on eleven subjects in less than forty-five minutes. Others were equally and obviously false, but not as starkly demonstrable.

Statement of Fact: During the trial and subsequent hearings many of the abuses were admitted by the guilty parties after evidence made denial impossible. Judge Winner then ordered the entire transcripts of the two grand juries turned over to him in order that he might see what other strange events may have occurred in this most strange of grand juries.

On his retirement at mid-hearing, he issued a second order that the same entire transcript be turned over to the defendant's attorneys for their determination of other violations that might be more apparent to them than to him.

On taking the bench for the continuation of the hearings, Judge Kane issued a third order, that the entire transcript also be turned over to him.

36. Seventy-eight sessions of the grand jury, numbering in the hundreds of pages, were withheld from all three parties in direct violation of all three court orders. (Court records, admitted). Violation - Contempt of court and obstruction of justice.

37. When caught, fifty-five of the sessions were finally turned over, proving they had been withheld. (Court records, admitted). Violations - Contempt of court and obstruction of justice.

38. The fifty-five sessions were not sequential, but random; and they were the very documents which contained the majority, if not all, of the proof of the many violations. (Transcripts). Twenty-three of the sessions are still withheld, in violation of the court orders, with the excuse that they were lost. Losing them is a per se violation. (Noted in judge's decision).

The law required that the transcripts be maintained in the[12] U.S. Attorney's office under lock and key. Had they been kept there, they would not be lost and the other disturbing questions raised by the losing would not exist. (Court records and admitted). Violations - Either additional acts of contempt, obstruction, perjury, violations of the rules of procedures for grand juries, or all of the above.

Comment: Considering the number of violations contained in the fifty-five found sessions, one must but wonder what was in the twenty-three that required their being lost.

39. The records disclosed, on numerous occasions, the clerk/recorder was ordered to cease recording and not to start again until commanded to do so. All proceedings must be recorded. (Grand jury transcripts). Violation - Rules for Grand Jury Procedures and the Fifth Amendment.

Comment: Having considered the content of the fifty-five found and wondered about the content of the twenty-three lost which were at least recorded, these questions arose. What on earth occurred during the hours, and at times days, that the agents/prosecutors feared to even have recorded? If they permitted the dozens of violations to be recorded that were recorded, what were they doing that was so much worse that they feared even gand jury secrecy might not protect them?

Statement of Fact: Abuse, badgering, and threatening of witnesses was not limited to those with pocket immunity.

A. Roland Hjorth, Professor, University of Washington Law School and recognized academic expert on tax law, was called as an expert witness. He testified that the deductions were not only legal, but that they were precisely the intent of Congress and deductible.[13]

40. At the noon recess, the prosecutor informed Professor Hjorth that he was a disgrace to his profession and implied he could be fired by the University if his testimony did not improve. (Testimony of Hjorth and a disinterested third party attorney witness). Violation - Obstruction of justice.

41. Furthermore, the prosecutor said, "I will see you in court," and he implied a personal indictment if Professor Hjorth did not change his testimony. (Testimony, same as 40). Violation - Obstruction of justice.

B. Richard Birchall, an ex-Assistant U.S. Attorney, who possessed Sixth Amendment protected attorney/client privileged information that the court had held, was not to be turned over to the government.

42. He was taken to a bar by the prosecutors, who attempted to get him drunk and obtain the documentation while he was intoxicated. (Testimony of Birchall, event (not purpose) admitted). Violation - Sixth Amendment attorney/client privilege.

43. When intoxication failed, the prosecutors threatened to indict Birchall as a co-conspirator if he didn't yield the documents. (Testimony of Birchall, denied by the prosecutors, but they admitted to considering Birchall as a target and may have mentioned it to Birchall). Violation - Sixth Amendment attorney/client privilege and obstruction of justice by threatening a witness.

44. When both failed, the prosecutor claimed that he had testimony from a female witness sd to an affair with Birchall.

Even if true, which it was not, this was an illegal disclosure of[14] secret grand jury information. (Birchall's testimony, prosecutor denies threat, but admitted discussion of the female witness). Violation - Rule 6E, disclosure of grand jury evidence.

45. That, if Birchall did not yield the document the prosecutor desired, the sex story would be given to Birchall's wife's attorney in his then current divorce proceedings. (Birchall's testimony, prosecutor denied). Violation - Obstruction of justice.

46. The documents desired by the prosecutor were stored for safekeeping with the government during Sixth Amendment hearings. Thereafter, the government had the information. The source was unknown, but the presumption was...? (Birchall's testimony, prosecutor admitted taking for safekeeping, but denied having acquired the information, he admitted having, in that manner). Violation - Theft, contempt, obstruction of justice and the lawyers' code of ethics.

47. At the time of Birchall's concern over the sex story, he was permitted free access to the grand jury's document room, an illegal disclosure of secret grand jury evidence. (Birchall's testimony, prosecutor first said Birchall lied then said Birchall shouldn't have taken advantage. The fact is the security of the documents were the prosecutor's responsibility). Violation - Rule 6E and Fifth Amendment.

48. To obtain documents, the prosecutor accused Birchall of making extortion threats to another attorney in a further effort to obtain documents. (Admitted by prosecutors). Violation - Obstruction of Justice.

C. Wilson Quintella, retired Admiral, Brazilian Navy, and an attorney, was a witness critical to the defendant's defense. Mr. Quintella is now a paraplegic and had, at the time, a serious stomach ailment. He was in the U.S. for medical treatment during periods of time, when the prosecutors hoped to convert him to their side.

49. Quintella was arrested as a material witness to be held in jail until trial. (Court Records). Violation - Tampering with a witness known to be favorable to the defendant.

Comment: Quintella was ordered released, but to return to testify, by a Federal Judge. Quintella delayed stomach surgery for four months to assure his availability at the trial to testify for me.

50. Three days before the trial, the agents notified Quintella, through the American Embassy in Rio de Janiero, that the subpoena was cancelled and his testimony was not needed. The subpoena was not the agent's to cancel, it was the court's. The witness was not the agent's, he was the defendant's. The witness submitted to surgery and was not available for testimony at the trial. (The letter was a court exhibit. agent admitted sending it). Violation - Witness tampering, contempt of court by dismissing a court order.

D. C.S.Gill and Michael Alberta were attorneys in Grand Caymen and were witnesses critical for me, against whom no charges existed.

51. Arrest warrants were issued for both through U.S. Customs by the agents/prosecutors, in case these men attempted to enter the U.S. in order to testify for me. (Warrants were in evidence,

admitted by issuers). Violation - Witness tampering, obstruction of justice.

E. Richard Bell, a respected accountant in the U.S. and Costa Rica and a citizen of the U.S., was given immunity in exchange for testimony about financial transactions.

52. When testimony was "not good enough" and it became obvious it was more beneficial to the defendant than to the government, he was threatened with, "All bets are off if you ever testify for Kilpatrick." This was apparently in reference to his pocket immunity. The threat was made in the presence of his attorney. (Testimony of Bell and his attorney. Statement admitted but the presumed intent denied). Violation - Obstruction of justice, blackmail.

Comment: These were acts committed against, or in the presence of, lawyers, presumably trained in their rights, knowledgeable of the law. If the arrogance of the government attorneys/agents extended to the belief that they could do this with qualified officers of the court, imagine their acts on the untrained and unknowledgeable average citizen. The effect on these individuals was unremarkable, they reported the incidents almost immediately. It was, and is not, surprising that even more serious acts on individuals less equipped, trained and educated in the law were not revealed until later, when some protection of the court was availed them. Others known acts remained unreported out of residual fear.

Statement of Fact: No one may be availed of any evidence obtained by the grand jury, or given the identity of the target, unless he is admitted to the 6(e) list. That list must be submitted to a judge before the information's disclosure.[17] Once admitted to the 6(e) list, a person may not disclose information to any other party. The only parties supposed to be admitted are those necessary to the prosecutor to perform his duties before the grand jury, and for no other purpose. Only the prosecutor may appoint them, and this authority may not be delegated. It is required by law that the identity of the target of a grand jury remain secret to others than those on the 6(e) list, until after indictment, if any, in order to avoid tainting the target with implied guilt associated with the investigation and to avoid tainting his reputation or witness testimony, that may be slanted if the target is known.

53. The agents identified the targets in dozens of letters to dozens of witnesses over four continents. (Letters in evidence and admitted). Violation - FRCP 6(E).

54. Letters were written on stolen U.S. Attorney stationary to render greater credibility. (Letters in evidence). Violation - Theft, unauthorized use of federal documents, FRCP 6(E).

55. Letters were signed by agents who were not authorized to sign such documents, even if the stationary had not been stolen from the U.S. Attorney. (Letters in evidence, showing the signature, testimony of U.S. Attorney's representative). Violations - Unauthorized usurpation of a federal authority, impersonation of an officer of the court.

56. Dozens of IRS agents traveled all over the U.S., interviewed hundreds of investors, and disclosed to each the identity of the targets. (Admitted). Violation - FRCP 6(E).

57. Many of the IRS agents were not on the 6(e) list and[18] should not have known, themselves, much less disclosed such imformation to others. (Records of the court). Violation - FRCP 6(E).

58. The 6(e) list was prepared by the agents, not the prosecutors, and decisions were made as to who would be required to help the attorneys. (Court records proved and admitted). Violation - FRCP 6(D).

Comment: The prosecutors did not know many of the people and were unaware as to why they were on the list. It was obviously for the illegal purpose of collecting taxes.

59. The 6(e) list was habitually not submitted prior to disclosure, but rather after. (Court records and admitted). Violation - FRCP 6(E).

60. One 6(e) list was not submitted until three weeks AFTER the grand jury adjourned. (Court records and admitted). Violation -FRCP 6(e).

61. Many IRS employees were given grand jury information that was never placed on the list before, during, or after the grand jury. (Court records and admitted). Violation - FRCP 6(e).

62. Records were illegally transferred to Lowery AFB, by the agents, to parties not on the list. The agents testified that the judge had given his permission, but the judge denied it. the agents were unable to find the supposedly signed order. (Court records, court testimony). Violation - FRCP 6(e).

63. The records were again transferred by the agents to other IRS offices in Ogden and Dallas. The agents did not even allege to have permission. (Admitted). Violation - FRCP 6(e).

64. IRS Civil Division supervisors, of no conceivable benefit to the jury or prosecutors, were placed on the 6(e) list and given grand jury information. (Grand jury records). Violation - 6(e) and Rules of Jurisprudence governing criminal and civil procedures.

65. Grand jury information was even given to student clerks, who were not on the 6(e) list. This was probably not a damaging act to the defendant, but indictive of attitude. (Admitted). Violation - FRCP 6(e).

66. The agents illegally presented evidence in tandem knowing not more than one could be in the room at once. (Admitted). Violation - FRCP 6(e).

67. The agents of and the IRS, itself, admitted the purpose of the grand jury was for civil purposes and that it was so used. (Testimony and documented in court) Violation - Civil/criminal rules of procedure.

68. The questionnaire used by the agents for potential witnesses contained dozens of questions with absolutely no relevance to any grand jury procedures, but it was of great importance to the illegal civil purpose of collecting taxes. (Questionnaire in evidence of court records). Violation - Civil/criminal rules of procedure.

69. Civil employees of the IRS were used to perform audits of investors which were of no benefit to the grand jury, nor were they ever presented to the grand jury. (Admitted). Violation - Civil/criminal rules of procedures.

70. Hundreds of letters had been sent to the investors by the Civil Division of the IRS notifying them that their returns were either to be audited or their deductions were already denied. This

was based on a report soon to be issued containing facts as presented in the Federal Grand Jury. The letters proved not only the illegal intent, but the accomplishment of illegal goals. (Letters in evidence in the court records). Violation - Civil/criminal rules of procedure.

Comment: The facts of the report were correct. Exactly what was purported to have been done was done by the defendants. What was not contained in the terrifying report was that all of the IRS theories of the illegality of the acts were thrown out by the court. The acts were declared legal on February 23, 1983.

Statement of Fact: No indicted party may be interrogated by a prosecutor without the party's attorney's permission and/or presence. Numerous court cases have held that the same privilege is extended to employees of an indicted corporation. A wife may never be forced to testify, and children's testimony is normally inadmissible.

The Bank of Nova Scotia was indicted as a co-conspirator. The bank was represented by an attorney who advised the prosecutor that an employee the prosecutor wished to interrogate had been transferred from Puerto Rico to Canada. He further advised that the employee would be made available upon request and that the attorney intended to be present.

The prosecutor discovered that the employee's wife and daughters, ages ten and eight, were still in Puerto Rico (the school term was incomplete); and he decided that the employee must be hiding out. He journeyed to Puerto Rico with an IRS civil agent, with no notice to the attorney.

71. The prosecutors decided to interrogate the employee without the attorney's presence. (Premeditation admitted). Violation - Conspiracy to committ a violation of the Sixth Amendment.

72. He and the agent surreptitiously followed the wife for five days through the streets of Puerto Rico. (Admitted). Violation - Fourth, Fifth, Sixth Amendments and the rules of the Bar Association.

73. He and the agent interrogated the employee's ex-secretary without the attorney's knowledge. (Admitted). Violation - Sixth Amendment.

74. He and agent interrogated the employee's replacement without the attorney's knowledge. (Admitted). Violation - Sixth Amendment.

75. He and the agent interrogated the bank's chief executive officer without the attorney present. (Admitted). Violation - Sixth Amendment.

76. He and the agent interrogated miscellaneous other employees without the attorney present. (Admitted). Violation - Sixth Amendment.

77. He and the agent attempted to interrogate the employee's children at school without the mother or attorney present. They did, in fact, interrogate their teachers and principal. (Admitted). Violation - Sixth Amendment and the laws of common decency.

78. He and the agent shadowed the childred after school, until they met up with their mother. (Admitted). Violation - Fourth, Fifth, and Sixth Amendments.

79. He and the agent shadowed the three to their home. (Admitted). Violation - Fourth, Fifth, and Sixth Amendments.

80. He and the agent then interrogated the wife and children before friends and neighbors, without the attorney, as to the husband's whereabouts. (Admitted). Violation - Fourth, Fifth, and Sixth Amendments.

81. When informed that the employee was, indeed, in Canada, he and the agent attempted to induce the wife to influence her husband to submit to secret interrogation without the attorney. (Admitted). Violation - Conspiracy to violate Sixth Amendment.

82. When confronted with the violation, the prosecutor admitted his awareness of the infractions. He stated that no case had ever been dismissed for such violations, that the only penalty normally imposed by the courts was the suppression of the evidence so gained, and that he hoped to avoid even that. But if he did, and he happened to get some good information, he would use it to try to develop the same information from another source and use it that way. (Admitted). Violation - Sixth Amendment.

Comment: The arrogation of an authority he did not possess and the intentional violation of citizens' constitutional rights were symptomatic of the entire investigation. His abysmal assuredness that he could get away with it was even more frightening. (Mental attitude admitted). Violation - Miranda, Messiah, Fourth, Fifth, and Sixth Amendments.

Statement of Fact: Early on in the hearings regarding IRS and prosecutorial misconduct, Judge Winner ordered government employees that were potential witnesses or targets sequestered. That meant they were not permitted any information as to testimony, nor were they to discuss together their own past or future testimony with one another. The purpose was to ascertain that their testimony was pristine, spontaneous, truthful, and not colluded.

83. Within an hour after the order, one such witness, an attorney who knew better, ordered the entire past transcript. (Admitted). Violation - Contempt of court.

Statement of Fact: The DOJ relieved all possible witnesses, immediately, of court duties in the case for the balance of the proceedings; and it replaced them with Charles Alexander, a Senior Trial Attorney, Tax Division, DOJ.

84. On Sunday evening, before the testimony of the sequestered witnesses on Monday through Wednesday, Mr. Alexander conducted a three hour meeting with all of the sequestered witnesses, in direct violation of the order. The only conceivable purpose was colluding in the precise testimony the judge had ordered sequestered. (Meeting admitted, purpose denied). Violation - Contempt, possibly collusion to perjury.

85. When caught, the excuse offered was that they weren't discussing their testimony, they were discussing the facts of the case. That, of course, begged the judge's question, "To what are they proposing to testify, the non-facts?" (Record of court testimony). Violation - Obstruction of justice.

86. After the meeting, the perpetrator of a temper tantrum, resulting in the mouthing of obscenities at the judge and a coat throwing incident in the courtroom in response to a ruling against him, denied its occurrence in the face of contrary testimony of five reputable disinterested witnesses. (Testimony). Violation -

Obstruction of justice by colluding to perjury and possibly perjury.

87. The five restrainers of the tantrum all testified exactly the same way, "I don't remember." (Testimony). No violation - Memory not provable.

Comment: Each of the disinterested witnesses had variations as to the details, but they were fairly consistent in their description of the overall incident. That was normal and a recognized reality of truthful testimony. Different witnesses, possessing no collusion of their testimony, routinely described scenes differently. The DOJ possessed the gall to suggest that, since their testimony so perfectly coincided and was more consistent, it should be given more weight and credibility than testimony with variations! It should be noted, also, that the meeting was not readily admitted. Rather, it was disclosed accidentally by one of the sequestered witnesses while on the stand, who had not thought of the incident until the meeting on Sunday night. It came out as the result of the following and obvious question. "What meeting was that, Ms. Serbough?" That was the only variation in their testimony, the others failed to mention the meeting.

Statement of Fact: The DOJ has an announced procedure that the target of a grand jury may request a review, prior to an indictment. The supposed purposes are: (1) A target is allowed to present his proposed defense, (2) If the defense has merit, the case or proposed indictment may be dropped if the higher echelon unbiased judge is convinced that no crime has been committed or that the evidence is insufficient to permit a conviction., (3) the procedure reduces costs for the DOJ for senseless prosecution, (4) The defendant saves the expense of a trial, (5) Needless embarassment is eliminated, and (6) The defendant's reputation that otherwise could be destroyed by an indictment for a non-existent or unprovable crime, can be salvaged. The reviewer supposedly occupies a quasi-judicial, unbiased position and passes judgment on whether the case should be prosecuted. In such hearings, the defense lawyer is led to believe he can be fully candid about his theory of defense and his plans, with no concern that his words will be thrown back at him or that he has forewarned the other side of his tactics.

88. Robert Grossman, an attorney for the defendant, requested and received such a review and was given one Jared Scharf, a man represented to be, but who was not, a reviewer. Rather, he was a trial counsel for the department. (Admitted). Violation - Deception, deceit, and fraud.

89. Mr. Scharf, it later developed, was not only a trial counsel, he was the ranking investigator in this very case which he was now reviewing. (Admitted). Violation - Fraud.

90. Mr. Scharf was not only the investigator, he, was also the lead prosecutor in charge in this case. (Admitted) Violation - Fraud.

Comment: It was tantamount to the judge first hearing the case, leaving the bench, taking sides and becoming the prosecutor. The statement of the prosecutor was that they did it all the time. Thus, the defendant's counsel was tricked into disclosing his entire defense tactics to his opponent, months in advance of the trial. This permitted the prosecutor to arrange his case in anticipation of the defense.

Statement: Miscellaneous Violations

91. An agent shredded documents in his possession that were potentially favorable to the defendant. (Admitted). Violation - Shredding 3500 documents.

92. The prosecutor mouthed obscenities at the judge's back, threw his coat on the floor and kicked it around the courtroom after a judicial decision to which he objected. Five agents and the Assistant U.S. Attorneys were required to restrain him. (Testimony of a courtroom witness, the editor of Aspen newspapers, an uninvolved attorney witness, an uninvolved law professor witness, and the judge's own court reporter.

93. None of the five agents nor the Assistant U.S. Attorneys could remember the incident when called to testify. (Court records). Violation - Obvious perjury, but memories not verifiable.

94. A prosecutor, Mr. Scharf the reviewer/prosecutor, who was involved but not admitted to the case, yelled at the judge from the spectator section behind the bar as the judge left the courtroom. He demanded an explanation of the decision and then entered into an argument with the judge over his wisdom and/or bias.
Comment: The Judge showed the greatest restraint (as per numerous knowledgeable parties) known, by not responding to this obvious attempt to obtain a mistrial in the, by then, obviously lost case by the government. (Court transcript). Violation - Contempt of court.

95. The prosecutors habitually crossed the forbidden line from being prosecutors and became investigators. (Admitted). No

Violation - They simply lost their otherwise absolute immunity[27] from civil suit in the pursuance of their duty.

96. The prosecutors filed a brief stating that the defendant's objections to all their misconduct were silly and frivolous. They actually believed they had the right to so behave.(Brief is record). Violation - Contempt of court, law, and defendant's rights.

97. Despite hundreds of grand jury secrecy violations by the prosecutor, he acted to the contrary when beneficial to him. He imposed secrecy on the only two witnesses to the jury on which secrecy could not be imposed, the defense attorneys. I was truly deprived of an attorney/client consultation, to which I was absolutely entitled. (The grand jury transcript). Violation - Sixth Amendment.

98. The prosecutors stated that, even if the defendant wasn't guilty, the government would break him with the cost of the defense and that the prosecutor intended to do so. (Court records). Violation - Fourth Amendment, the confiscation of my property and assets without due process.

99. The prosecutors discovered a proposed merger of my corporation with another international company, that would save my company from the planned destruction. They subpoenaed my comptroller to learn the details in order "to shoot the deal in the ass." (Court testimony). Violation - Fourth Amendment.

100. The prosecutors in the grand jury allowed a witness to hear the testimony of other witnesses, a violation of secrecy and very prejudicing of supposedly independent testimony. (Testimony of numerous witnesses). Violation - 6(E).

101. A former U.S. Attorney, whose testimony was favorable[28] to me was called a liar by the agents concerning a fact about which it was impossible for the agent to have any knowledge of its truth or untruth. (Testimony of former U.S. Attorney). Violation - Badgering of a witness.

102. A witness, hesitant to testify without council, was told his attorney had given his permission when the prosecutor knew that he had not. (Admitted). Violation - Fifth and Sixth Amendments.

103. That same witness, an attorney, was thus induced to violate his own client's attorney/client privilege, at the same time he was tricked into relinquishing his own. (Admitted). Violation - Sixth Amendment.

104. When grand jury agents summarized evidence for the jury while seeking the indictment, the summaries contained numerous inaccuracies which led to misconceptions by the jury. Those lies led to the indictments, which the true evidence did not support. (Grand jury transcript and judges order). Violation - Perjury and Fifth Amendment.

105. The agents and prosecutors both had been informed that the business transactions, to which they objected, were not illegal; but they requested the indictments, presumeably, to accomplish their stated goal. "We may not convict, but we will destroy." (Court records). Violation - Fourth Amendment and wrongful prosecution.

106. Another IRS agent, not an attorney nor in any other manner qualified to be, was represented as the expert in the field to summarize the prosecutor's legal theory to the jury. It was a theory totally alien to the law, but impressive to the layman jury

members, who were dependent on the agent of the grand jury and[29] the expert on whose knowledge they had been told they could rely. (Grand jury transcripts). Violation - Perjury, wrongful prosecution, Fourth Amendment.

107. The agents and prosecutors accepted and prosecuted the indictment which they knew was so tainted. (Court records). Violation - Fourth, Fifth, and Sixth Amendments.

108. The agents and their 6(e) list assistants threatened potential witnesses if they did not voluntarily render the desired information. (Court testimony, admitted). Violation - Obstruction of justice.

109. The prosecutors habitually asked employees of my company, favorable to me, who was paying their attorneys. This left the jury with the impression I was financing their testimony. The question was not asked of those helpful to the prosecutors, whose attorneys I was also paying. They were all employees, and all companies routinely pay employees legal fees for acts performed in the course of their duties. (Grand Jury transcript). Violation - Fifth Amendment.

110. When Judge Winner attempted to publish his memorandum opinion concerning these violations, the Department of Justice, Tax Division attempted to gag his order by forbidding its publication (appeal to 10th Circuit). Violation - First Amendment, guarantee of freedom of the press, against prior restraint. It also violated the principal of the separation of powers, attempting to impose control over the Judicial Branch by an Executive Branch agency.

## SUMMARY/CLARIFICATION OF VIOLATIONS

Author's Statement:

Many of the rule violations and illegal and unconstitutional acts listed above, if they stood alone as isolated and unintentional, would perhaps, possibly, be minimally acceptable. In total and in planned concert, they were horrendous to have occurred in a supposedly free nation ruled by law and the Constitution. Others, in and of themselves, occurring in only an isolated situation, would be grounds for great indignation and wrath by a concerned citizen.

1) Taken in total, 2) with admission by the attorneys of the IRS and the Tax Division of the Department of Justice that they did it all the time, 3) with their obvious surprise that anyone would object, 4) with their displayed anger and frustration when the judges ruled for those objections, and 5) with the appeal of the decision despite their admission of the commission of the acts, lead but to one inescapable conclusion. We, as Americans, are in deep trouble.

I, in no way, apologize for having earned and possessed the wealth, the six million dollars in legal fees, necessary to bring out this abortion of justice; but, I am concerned. I am a free exonerated citizen today for one reason. I had the six million dollars. Thousands of Americans, equally innocent, are being steamrollered by these same tactics into payment of unowed taxes and/or prison. Their only true "crime" is to have not been equally blessed with the finances to defend themselves.

That was not, and is not, the intent of our founding fathers. The very purpose of the revolution, the Declaration of Independence, and our Constitution was to ascertain that: 1) Never again would only the elite have equal protection under the law,[31] 2) Never again would the elite, be they disguised as kings, royalty, or bureaucrats, acquire power over the people, 3) This was to remain a nation of, by and for the People, and 4) We would never again be a society held together for the BENEFIT of the governing.

I fear that just this event, if it has not already happened, is happening. The above is proof it has happened in the element of taxation. If you are not secure in your rights to your property and person, you have no security of any rights. Ask any oppressed people.

Number of Violations

In some instances in this listing of violations, an act was repeated as a different number. This was done to clarify its implication to either the proceeding or succeeding act.

It should be made clear, the total violations numbered only one hundred and two, not the one hundred and nine as shown. Lord knows, one hundred and two are sufficient and there was no need for exaggeration.

Having so spoken, I should explain further, however, that most of the one hundred and two were committed time and again, some well over a hundred times. A few were committed in the thousands of times during the course of this seven year nightmare.

1. Violations #3 - #8 and #11 were recommitted daily for over eighteen months.

2. Violation #10 was committed a proven sevnty-eight times with unknown quantities of others.

3. Violation #16 was potentially committed 88,0000 times, since there was no way to prevent all 88,000 employees of the IRS

from availing themselves of the information; and there was no reason to store it there other than for them to avail themselves.

4. Violations #25 - #32 were committed at least a proven Twenty-eight times, with known but undocumented others.

5. Violation #36 was committed seventy-eight times.

6. Violation #38 was committed twenty-three times.

7. Violation #53 was committed twenty-eight 28 times.

8. Violation #56. The exact number was unknown but the commitments were known to be in the hundreds.

There were only one hundred and two types of crimes, but there were thousands of incidences of the commission of those crimes.

Do not be deceived by the belief that this was an isolated case, conducted by one or two misdirected individuals outside the approval of the IRS. The acts were accomplished in the full light and knowledge of, and in complicity with, dozens, if not hundreds, of IRS and Department of Justice employees.

date, which caused the ALJ to consider only Vernon Ross' *period of disability* rather than his entitlement to benefits. This would have been proper under Section 402(d)(8)(D)(ii)(II), *if* Patrick had been adopted *after* Vernon Ross was entitled to benefits.

[4] Since Patrick's adoption occurred while Vernon Ross' benefits were under suspension, I also must construe Section 402(d)(8)'s use of the term "before." Because a suspension of benefits is a matter beyond a benefit claimant's control, there is little danger that a claimant will "manufacture" a suspension in order to qualify a child adopted during the suspension to receive child's benefits. I conclude, therefore, that for purposes of Section 402(d)(8), an adoption that occurs during a suspension of benefits falls within the meaning of "before" as used in the first phrase following Section 402(d)(8)(B).

For all these reasons, Patrick's adoption occurred before Vernon Ross became entitled to benefits. Since the ALJ's error was legal, and not factual in nature, I reverse his decision and award child's insurance benefits to Patrick J. Ross.

Accordingly,

IT IS ORDERED that the defendant Secretary of Health and Human Services' decision with regard to the claim of Patrick J. Ross for child's insurance benefits is hereby reversed, and the defendant Secretary is ordered to pay such benefits to Patrick J. Ross.

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**UNITED STATES of America, Plaintiff,**

**v.**

**William A. KILPATRICK, et al., Defendants.***

No. 82-CR-222.

United States District Court,
D. Colorado.

Aug. 25, 1983.

Following jury verdict of guilty of obstruction of justice, defendant moved for dismissal or new trial with pending dismissal motions resting on accusations of Internal Revenue Service and prosecutorial misconduct during grand jury proceedings and during trial. The District Court, Winner, J., held that: (1) there was a more than adequate showing that grounds may have existed for motion to dismiss indictment and accordingly entire grand jury transcript dealing with indictment would be made available for study by defense counsel, and (2) one defendant was entitled to new trial.

Ordered accordingly.

**1. Criminal Law ⇨627.6(6)**

There was a more than adequate showing that grounds may have existed for motion to dismiss indictment because of Internal Revenue Service and prosecutorial misconduct during grand jury proceedings; accordingly, entire grand jury transcript dealing with indictment would be made available for study by defense counsel. Fed. Rules Cr.Proc. Rules 6, 6(e)(3)(C), 18 U.S.C.A.

**2. Witnesses ⇨8**

Lawyers cannot substitute themselves for the court to release a witness from subpoena.

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* This opinion which was originally published at 570 F.Supp. 505 was withdrawn from the bound volume on order of the United States Court of Appeals for the Tenth Circuit that further publication be temporarily delayed. The order so providing has now been vacated by the Court of Appeals.

**3. Criminal Law ⟹919(1)**

Defendant was entitled to new trial because of alleged improprieties including government counsel's releasing a witness from subpoena.

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William Waller and Richard K. Rufner, Wagner and Waller, Englewood, Colo., for defendant Kilpatrick.

James L. Treece, Treece, Zbar, Webb & Kenne, Littleton, Colo., for defendant Declan O'Donnell.

James Nesland, Ireland, Stapleton & Pryor, Denver, Colo., for defendant Bank of Nova Scotia.

H. Alan Dill, Dill & Dill, P.C., Denver, Colo., for defendant Sheila Lerner.

Linda Surbaugh and Robert Miller for U.S. Atty's. Office, D. Colo., Denver, Colo., and Charles J. Alexander, Dept. of Justice, Tax Div., Washington, D.C., for U.S.

WINNER, District Judge.

This case was started with a multiple count, multiple defendant indictment returned after an investigation spanning the lives of two grand juries. Judge Kane dismissed all except one count, which left a one defendant charge of obstruction of justice case to try. It was prosecuted by three attorneys employed by the Tax Division of the Department of Justice in Washington. The single remaining count of the indictment had absolutely nothing to do with tax law, and the trial could have been handled competently and with aplomb by any assistant United States Attorney living in Denver, but the administrative decision of the Department of Justice was to send three lawyers from the Tax Division to try an obstruction of justice case, a prosecution unrelated to their professed area of expertise.

I mention this fact for one very important reason. Following a jury verdict of guilty, defendant moved for dismissal or a new trial, and the pending dismissal motions rest on accusations of IRS and prosecutorial misconduct during the grand jury proceedings and during trial. There is absolutely no suggestion of any improper conduct on the part of the United States Attorney for the District of Colorado or on the part of any of his assistants. Defense counsel carefully point out that neither they nor their client complain about anything other than acts of the IRS and Department of Justice Tax Division lawyers who ran the grand jury and tried the case. Based upon my review of the record and participation in the trial, I share their view that the Colorado United States Attorney's Office is absolutely blameless in this case so fraught with problems. Also, it should be emphasized that no one is critical of government counsel now handling the post trial motions.

To fully cover all of the headaches of this case would require a volume, and I don't plan to write that book for reasons which will appear presently. Instead, I shall highlight some of the things which occurred during the investigation and during the trial of the case. But, there are so many things to cover that this opinion won't be short. Many of the accusations are disputed by the accused government counsel and agents, but they are forced to admit a few instances of "mistake", and their denials of facts run contrary to testimony of a large number of witnesses. To accept the testimony of government witnesses at full value would require that I effectively decide that quite a few reputable lawyers and citizens of this community and other communities are guilty of perjury, and I make no such determination. The record made to date is incomplete. A full evidentiary hearing was scheduled, but, as will be explained later, present government counsel was not able to prepare for the first hearing, and the testimony of essential government witnesses was put over for three weeks. It was ordered that a summary of the testimony of government witnesses be furnished in advance of a hearing scheduled some three weeks later. The summary was furnished, but the government witnesses weren't called although I and defense counsel wanted them called.

Therefore, at this point, all I have to rely on is the summary of proposed testimony, but the witnesses have not been sworn nor have they been cross examined.

With that, then, I set the stage for some of the bizarre happenings in this case, and I do so by mentioning a frequently quoted case. In 1935, in *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314, Justice Sutherland, speaking for a unanimous court, criticized the misconduct of the prosecutor in that case. The prosecutor had injected his personal belief concerning the facts of the case (so did a prosecutor here) and he had unfairly cross-examined witnesses. That which the court said concerning reliance by a jury on a prosecutor's integrity is even more applicable to the reliance of a grand jury on a prosecutor. As to a prosecutor's duties, the Court said:

> "The United States Attorney is the representative not of an ordinary person to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> *"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed...."*

Perhaps the thing which disappoints me the most is the forgetfulness of the grand jury itself in going along with having two IRS agents in charge of the IRS investigation sworn as "agents of the grand jury". Yet, I can understand, as Justice Sutherland said in *Berger v. United States*, that grand jurors rely on Justice Department lawyers for their legal advice. They should do this, but because I empanelled the first of these two grand juries, I know what those jurors were told, and I strongly suspect that the second grand jury was told about the same thing. I orally, and on the record, stressed that a grand jury has a duty to protect the innocent and I emphasized that a grand jury is an independent body, separate and apart from investigative agencies and that grand juries are not an arm of the prosecution but instead, th have a duty to examine the governmen case carefully. I didn't tell them that they couldn't appoint IRS agents as their own "agents", because it never occurred to me that there could be such a blurring of the "investigative agency", "prosecuting attorney" and "grand juror" functions. However, I did supply each grand juror with a copy of the recommended instructions to grand jurors authored under the auspices of the Judicial Center, and I urged each grand juror to read the instructions frequently to be sure that they adequately performed their duties. (I now urge that Justice Department prosecutors read them). Those instructions say in important part:

> "You will recall from my earlier remarks that the grand jury developed in England as an entity independent from the king to protect a subject from an unwarranted prosecution. The king could not charge a subject with a serious crime without first submitting evidence and witnesses to a grand jury, which then decided whether to return an indictment against the accused person.
>
> Just as the English grand jury was independent of the king, the federal grand jury under the United States Constitution is independent of the United States torney, the prosecutorial agent o executive branch of the federal go ment. The grand jury is not an arm of the Federal Bureau of Investigation; it is not an arm of the Internal Revenue Service; just as it is not an arm of the

> United States Attorney's Office. There has been some criticism of the institution of the grand jury for allegedly acting as a mere rubber stamp approving prosecutions that are brought before it by government representatives. Similarly, you would perform a disservice if you did not indict where the evidence warranted an indictment.
>
> As a practical matter, you must work closely with the government attorneys. The United States Attorney and his assistants will provide you with important service in helping you to find your way when confronted with complex legal matters. It is entirely proper that you should receive this assistance.
>
> However, you must remember that you are not the prosecutor's agent. Your role is related to but clearly distinct from that of the government attorneys who will assist you, and it is important that you keep the distinction between the roles clearly in mind. Although you must work closely with the government, you must not yield your powers nor forego your independence of spirit.
>
> These comments are meant to be cautionary in nature. The government attorneys are sincere men and women, and you will develop ordinary human feelings as you work with them during your term of service. If past experience is any indication of what to expect in the future, then you can expect candor, honesty, and good faith efforts in every matter presented by the government. However, it is because you may tend to expect such high quality from the government's agents that there is a potentially grave risk to your independence of thought and action, which may cause you to lapse into reliance when you should be dubious or questioning.
>
> You should also remember that the government attorneys are advocates of the government's interests. They are prosecutors; you are not. While they will usually balance fairly the government's interest against the interest of a citizen's personal liberty, it is your responsibility to ensure that the proper balance is achieved in every case brought to your attention. You must exercise your own judgment, and if the facts suggest a different balance than that advocated by the government attorneys, then you must achieve the appropriate balance even in the face of their opposition or criticism."

In the face of these instructions, the grand jury wasn't two minutes into its investigation when one of the Justice Department lawyers personally administered an "oath" to an IRS Special Agent, and that "oath" was:

> "Mr. Mendrop, do you swear to carry out the duties as directed by the Foreman and Members of the Grand Jury, keep all proceedings of matters and documents which are received pursuant to your work with this grand jury secretive?" (sic).

In its brief the government says:

> "The government concedes that Mr. Snyder had no authority to administer oaths to agents. However, Mr. Snyder will testify, and the record will reflect, that the agents were first given an oath by the foreman. It was only after they had been sworn in by the foreman that Mr. Snyder gave the agents what purported to be an additional oath directing the agents to maintain secrecy."
>
> [As has been noted, this testimony hasn't been presented yet, and on the sworn record made to date, it is not clear who gave an oath to testify truthfully.]

The government then "quotes" from the transcript which shows that those were the facts. That's not what the transcript which was supplied to me shows, and I am concerned about the validity of someone's transcript. It is true that other "oaths" administered by Mr. Snyder do appear to have followed an oath administered by someone to testify truthfully, but if any such oath was administered to Mr. Mendrop at the first session, it doesn't show up in my copy of the transcript.

Six months later, the Special Agents of the IRS were each sworn as an "agent" of the second grand jury, and if there could be any doubt as to the mingling of the investigative agency/prosecutorial/grand jury functions, the hash which results from the following proceedings eliminates that doubt. After a statement by government counsel that he wanted the agent sworn as an "agent of the grand jury", this job description was furnished by Mr. Snyder:

> "...when he interviews people and he looks at this stuff, he is not looking at it so much as a special agent of the criminal investigation division of the Internal Revenue Service, and he is looking at (it) as your agent and he is amendable to you and he is amendable to Rule 6. Do you recall Rule 6, the Grand Jury secrecy?
>
> "*What it is, is very, very plain, and it states in what capacity he is operating in this investigation so there is no question about it.*
>
> (The agent was then sworn as a witness by someone, and the transcript continues)
>
> "MR. SNYDER: Do you have the oath to make him a—they don't have the oath. Raise your right hand. Do you solemnly swear that the information and evidence which you receive pursuant to the Grand Jury you will keep secret to yourself *except as provided by the foreman of the Grand Jury* or federal judge? ... In the course of your *duties as a special agent and also as an agent of a previous grand jury* have you conducted an investigation into the affairs of one William A. Kilpatrick?"

I don't know how it could be any clearer than in Mr. Snyder's eyes, the agent's investigation was a combined IRS and Grand Jury investigation conducted by a single "agent", and, of course, under Rule 6 he was the prosecuting attorney's little helper. That isn't what the stock instructions to grand jurors say should be done, and, although the government argues that other grand juries have had agents, it fails to come up with a case approving the practice and it fails to mention any case discussing the blurring of functions. The government relies on *United States v. Cosby,* (1979) 5 Cir., 601 F.2d 754. There, the court itself challenged the practice of appointing an "agent of the grand jury", but it "assumed" that the practice was proper because it reversed the case on other grounds. The opinion cites several cases where "the use of third parties to assist grand juries has been considered and approved," but it is to be noted that those cases were decided before the amendment of Rule 6(e) which makes no mention of grand jury "agents" and which says that disclosure may be made to government lawyers for use in the performance of duty, and to other governmental personnel "as are deemed necessary by an attorney for the government *to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.*" The rule doesn't permit the grand jury to have an "agent", and it categorically says that Rule 6(e) permits disclosure to non-lawyers for the single purpose of assisting the "attorney for the government". The rule doesn't mix up the separate functions of prosecutor and grand jury, and with Rule 6(e) clarified, those functions cannot be blended.

My thoughts on this score are in full accord with those of the Advisory Committee, because its note to the 1972 amendment to Rule 6(e) says:

> "Federal crimes are 'investigated' by the FBI, the IRS, or by Treasury agents, *and not by government prosecutors or the citizens who sit on grand juries.*"

Here, the "Grand Jury Agents" investigated and they testified, all the while being special agents of the IRS, and, as will be detailed later, a government prosecutor "investigated" on the streets of Puerto Rico.

The government concedes the obvious. A lawyer employed by the Tax Division of the Department of Justice can't administer oaths, but, sworn or unsworn, I don't think that an IRS special agent can act in the combined capacity of IRS Agent, "Agent for the Grand Jury" and recipient of grand jury information supplied under Rule 6(e) for the sole purpose of helping out the prosecutor. This is a confusion not of apples and oranges. It is confusing apples, oranges and bananas.

Admitting impropriety in the conduct of counsel, the government's brief argues that the error wasn't serious and that it resulted from good motives of Mr. Snyder. The error may or may not be serious, and I express no opinion as to the gravity of the error. However, the government is playing with fire in arguing that good motive excuses making one's own law. I discussed my thinking of this argument at quite some length in *United States v. Best*, (1979) 476 F.Supp. 34, where I ruled that a belief that blocking some railroad tracks would save the world from nuclear devastation didn't excuse the offense, and the Tax Division has surely heard tax protestors say that their motives in refusing to obey the tax laws are pure as the driven snow. Mr. Snyder's good intentions don't excuse his arrogation of a power he didn't have. And, even if the illegal "oath" doesn't amount to serious error, it started the case downhill on a course of repeated excesses on the part of the prosecution. Good intentions or ignorance of the law don't make those errors go away. The creation of the "office" of grand jury agent is harder to excuse when the impartial jurors' "agent" is a chief investigator of the IRS case against the defendants and is receiving grand jury information under Rule 6(e) only to help out the attorney for the government charged with the supervision of presentation of the government's case to the grand jury.

What has been said thus far, and much of that which is to follow, bear in no way on the trial itself, and, therefore, those things can't enter into a decision of whether a new trial should be granted. That which took place during the grand jury proceedings and most of that which took place outside the presence of the jury couldn't poison the jury verdict, and these alleged transgressions are argued in support of the motion to dismiss because of prosecutorial misconduct and in support of claimed lack of professionalism of government counsel. Therefore, insofar as possible, I shall try to discuss the arguments bearing on the new trial motion in a separate part of this memorandum.

In a brief filed by trial counsel (not signed by present counsel for the government and not adopted by Colorado's United States Attorney whose typewritten signature does appear) the many accusations were described as "silly", but they aren't either silly or frivolous. Indeed, the brief filed by trial counsel was couched in language far different from that which the court is accustomed to reading. When asked, Mr. Scharf said that higher authority in the Justice Department Tax Division had approved the brief and its phraseology, and that higher authority thought the whole thing was a ploy of defense counsel. If that be so, the lawyers in the upper echelon of the Tax Division have adopted a style of brief writing markedly different from that Justice Department lawyers have filed with this court in the past, and I have had my fair share of experience in dealing with Tax Division lawyers for whose ability and ethics I have the highest regard. And, if the overlords of the Tax Division think this whole mess is just a ploy, I recommend that they take a second look.

Since I started this with the grand jury proceedings, I think that I should continue with them and with matters which occurred during the trial which don't impact on the new trial motion but which are aimed at the dismissal motion and lack of professionalism. I think that the place to start is with Rule 6(e), F.R.Cr.P. itself, because that is the rule which governs grand juries and it is the rule which was violated here. I quote from Rule 6(e) and I italicize the phrases in that section which are of importance to this case:

> "(e) Recording and Disclosure of Proceedings.
>
> "(1) All proceedings, except when the grand jury is deliberating, shall be re-

corded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. *The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government* unless otherwise ordered by the court in a particular case.

"(2) A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, *an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury* except as otherwise provided by these rules. *No obligation of secrecy may be imposed on any person except in accordance with this rule.* A known violation of Rule 6 may be punished as a contempt.

"(3)(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

"(i) an attorney for the government for use in the performance of such attorney's duty; and

"(ii) such government personnel as are deemed necessary *to assist an attorney for the government in the performance of such attorney's duty to enforce criminal law.*

(I don't know how it can be argued that this language permits disclosure to IRS agents to work as "agents for the grand jury" unless it is argued that the grand jury is simply an arm of the prosecutor's office, and if that be the argument, almost 800 years of history is going to have to be forgotten. The document King John signed at Runnymede contains no such concept, nor does our Constitution.)

"(ii) such government personnel *as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty* to enforce federal criminal law.

(It seems pretty clear to me that the IRS agents to whom disclosure was made were hired guns of the prosecutor and the IRS—not of the grand jury.)

"(B) ... An attorney for the government shall promptly provide the district court, before which was empanelled the grand jury whose material has been so disclosed, with the names of the persons whom such disclosure has been ma

(The language of the rule is this clumsy

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made.,

. . . . .

"(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct."

I first mention something not raised by defense counsel, but defense counsel had no way of knowing anything about it. I found out about it from a scanning of the full file drawer of grand jury transcript. A while back, it was the practice to make grand jury witnesses take an oath of secrecy, and this is still the rule in some state court systems. Because of public outcry, the rule was changed, and, as has been seen, this is now verboten because of the language of the rule saying, "No obligation of secrecy may be imposed on any person except in accordance with this rule." language has been uniformly interp prohibit any instruction to a witne his testimony is secret. *In re Langswager* (1975) D.C.Ill. 392 F.Supp. 783; *In r* *Grand Jury Witness Subpoenas* (1974

D.C.Fla. 370 F.Supp. 1282; *In re Alvarez* (1972) D.C.Cal. 351 F.Supp. 1089; *In re Minkoff* (1972) D.C.R.I. 349 F.Supp. 154; *In re Investigation before April 1975 Grand Jury* (1976) D.C.Cir. 531 F.2d 600; *In re Vescovo Special Grand Jury* (1979) 473 F.Supp. 1335, and many other cases. In spite of this express command of Rule 6(e), secrecy obligations were imposed on several witnesses, and, to make the violation more disturbing, secrecy obligations were imposed on lawyers called to furnish information concerning their clients. That makes the violation gravely beyond the le, because of the impossible position the wyer-witness is placed in, but that's what the grand jury transcript discloses. No "oath" of secrecy was administered, but an obligation of secrecy was imposed by instructions from government counsel to witnesses. This foolishness may or may not have been intentional, but ignorance of the law is not a defense available to a prosecutor. This misconduct is established by the record, and it will prove difficult for the government to deny, just as the government had to admit the attempted administration of an "oath" by Mr. Snyder. The government surprisingly defends the proven mishmash of function of the IRS Special Agent/Grand Jury Agents/Assistants to the Attorney for the Government appointed under Rule 6(e), but maybe it thinks that admitting that this was error would confess the motion to dismiss.

I come now to other accusations made by defendant and pretty much denied by the prosecutors and IRS agents. I make no finding as to whether most of the charges are proven or unproven, but I do find that as to all assertions made by defendant there is cause for concern that the prosecutor's conduct before the grand jury may require dismissal of the indictment. The accusations are made sincerely; there is me evidence to support all of them, and e is quite a bit of evidence to support e. However, before factual findings can be made, a further hearing permitting participation by all parties interested in the grand jury proceedings is necessary—something which will be explained later. Most importantly, of course, the testimony of government counsel is essential, and it is still missing although all three of the lawyers were in Denver during the last hearing.

Because that additional hearing is required, I shorten discussion of most of the claims of prosecutorial misconduct, but I shall comment briefly on them. Frequently I will phrase the charges as if the facts had been established, but I emphasize that I am not saying that the facts have been proven. I am just adopting the practice of the government in phrasing an indictment in language saying that thus and so are the facts. I am only phrasing the defendant's charges against the government in the same way the government phrases its charges against a defendant, and the fact that the charges are made is not evidence that they are true, nor do I find that they are.

Richard Birchall is a lawyer formerly with the Tax Division who practices in New Jersey and who did some work for defendant and his company. He was subpoenaed to testify before the grand jury, and he showed up in Denver pursuant to the subpoena. He says that he met Mr. Snyder and the agents in a bar and they downed a few drinks paid for by Mr. Snyder. During this session Mr. Snyder supposedly disregarded the secrecy rules and, having done so, he told Mr. Birchall he was a potential target. He added that there was testimony about a personal relationship of Mr. Birchall's, a comment which was bothersome to the witness because of marital problems of Mr. Birchall. These communications are of a nature (if they were made) designed to bring about hurried cooperation from a witness, and especially from a witness who is a former Tax Division lawyer practicing tax law in the private sector. While in Denver, Mr. Birchall was left in a room with some grand jury transcripts and material lying on a table in plain sight. Mr. Birchall scanned some of the material trying to locate that which dealt with the matters discussed by Mr. Snyder. Perhaps he shouldn't have done this, but this is a matter of morals while grand jury secrecy is a matter covered by Rule 6, and Mr. Snyder was under it, but Mr. Birchall wasn't. Moreover, Mr. Birchall testified that he thought that he was being threatened by Mr. Snyder, and he was reacting to the threats. I pass no moral judgment on what happened because that's not the question to be decided in this case.

This doesn't end the accusations made through Mr. Birchall's testimony. He said that Mr. Snyder tried to persuade him to breach his ethical duty of confidentiality and he attributed to Mr. Snyder a remark that even if the defendant wasn't guilty, the government would "break him" with the cost of the defense. These accusations go to the heart of our system of justice, and it was no ploy on the part of defense counsel to bring the accusations out for public scrutiny.

Professor Roland Hjorth teaches tax law at the University of Washington Law School, and he is a recognized expert who was employed by defense counsel on the recommendation of the professor of tax law at the University of Michigan. At the request of defendant, Professor Hjorth was permitted to testify as an expert before the grand jury. His views of tax law differed markedly from those of Mr. Snyder, who bragged on frequent occasions that he had never taken a course in taxation and knew almost nothing about it. Nevertheless, Professor Hjorth was browbeaten and ridiculed by Mr. Snyder, and some of the conversation so out of place for an ethical prosecutor took place during a recess in the hearing of some grand jurors. The government's post trial brief says as to this breach of ethics and standards of common courtesy:

> "It was poor judgment on the part of Mr. Snyder to carry on a conversation with Professor Hjorth while two grand jurors were present. However, the record fact is that there was no disclosure of Grand Jury material during the conversation."

I'm not so sure about that. The record shows that the argument and ridicule was as to that which Professor Hjorth had testified to, and that persons other than grand jurors could hear the argument. However, even if the government is correct in this statement, the fact is that the argument begs the real question. Professor Hjorth also testified that as a result of Mr. Snyder's conduct, he would never again appear as an expert witness. Intimidating witnesses by telling them that their testimony disgraces them and implying that the Tax Division of the Department of Justice will take after the witness and will complain to the University of Washington Law School because an expert testified to his expert opinions does no credit to our government. I think that the government's argument in its post trial brief is unconvincing, and, seemingly, the professor's testimony isn't seriously contested. I hope that we haven't gotten to the point that disagreement with the legal concepts of the IRS provides grounds for attacks by that bureaucracy because sometimes the IRS is wrong. *U.S. v. Sells Engineering* (1983) — U.S. —, 103 S.Ct. 3133, 77 L.Ed.2d 743 and *U.S. v. Baggot*, — U.S. —, 103 S.Ct. 3164, 77 L.Ed.2d 785.

Peter Parrish is a former IRS agent who is now employed as an accountant and who worked for defendant. He said that when he responded to a subpoena, he was interviewed by Mr. Blondin and matters which took place before the grand jury were discussed. He also said that the discussions could be heard by outsiders. I don't approve this casual approach to witness interviews, but I think that the incident is picayune. It doesn't deserve discussion.

To further muddle the status of the Special Agent/Grand Jury Agent/Assistant to the Prosecutor matter, letters were written on the letterhead of the United States Attorney for the District of Colorado, and they were signed by the IRS agents with an explanatory line under their signature saying that they were "Special Agents". The letters were authorized by Justice Department attorneys, but they were not authorized by the United States Attorney in Colorado. Apart from the fact that IRS agents who claim to be "agents of the grand jury" shouldn't be using the U.S. Attorney's letterhead, the identity of the persons and the transactions which were under grand jury scrutiny shouldn't be disclosed to anyone by letter or otherwise, but these startling letters did precisely that. I can't fault the IRS agents for this because the government's brief says as to these singular letters:

> "Mr. Blondin and Mr. Snyder on these occasions asked the agents to send out correspondence and to sign the letters for them, after having the contents of the letter read to them over the phone. On no occasion, did the agents who were acting under the direction and control of Mr. Snyder, Mr. Blondin and the United States Attorney's Office sign any such letters without advance authority from the government's attorneys."

The United States Attorney for the District of Colorado has disavowed the letters written on his letterhead, and he has seen to it that this won't happen again.

Thus, the disclosures were made with knowledge of Tax Division lawyers and the IRS agent signatures on U.S. Attorney stationery were approved by them. The government has cited no authority for this novel procedure by which the nature of that which was going on before the grand jury and the identity of a target was certified to in writing on the letterhead of the U.S. Attorney who was not running the investigation. Once more, I attribute no fault to the U.S. Attorney.

In recent years, the use of "pocket immunity" has become prevalent. The phrase, for the benefit of the uninitiated, refers to a practice of ignoring the Congressional mandate as to how immunity can be granted and instead of doing what Congress commands, informally substituting a "deal" struck between a prosecutor and a witness. The enforceability of the side agreement in the federal court is an open question, but I have never heard it even argued that federal pocket immunity applies to a state court prosecution. However, when it is coyly suggested that a lawyer's client is a target of a grand jury inquiry and that the client can escape the range of fire by incriminating himself along with someone else, the carrot proffered by the prosecutor is hard to resist. Not unimportant, of course, is the fact that the pocket immunity need not be included in statistical reports showing the number of immunities granted in federal prosecutions. (These statistics have been of interest to Congress in the past, and I believe that they still are.)

The deal is a good one for both sides, but it skirts the law. It can be granted on a local level by lawyers not authorized to approve the grant of formal immunity, and no report of its use is required. Formal immunity would have required the approval of the United States Attorney and a designated Assistant Attorney General. But pocket immunity can be granted at the whim of any lawyer running a grand jury, and there is no public record of the side deal. Here, the United States Attorney didn't authorize nor did he approve the immunities. In fact, he didn't know anything about them, although statutory immunity requires his okay.

The history of immunity statutes, colonial, state and federal, is set out in footnotes to *Kastigar v. United States* (1972) 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212, and the present immunity statute enacted in 1970 is there discussed, as is the Congressional intent in its enactment. The intent as to the formality of grants of immunity is quite plain. 18 U.S.C. § 6002 effectively recognizes privilege against self-incrimination up to the point "the person presiding over the proceeding communicates to the witness an order issued under this part," to testify. The preliminaries to obtaining such an order are spelled out in 18 U.S.C. § 6003, and they are:

1. There must be a request for the order *made by "the United States attorney for such district."*

2. The request by the United States Attorney for the immunity grant *must then be approved by "the Attorney Gen-*

*eral, the Deputy Attorney General, or any assistant Attorney General."*

3. There must be a certification that the testimony may be necessary for the public interest and that the witness has refused or is likely to refuse to testify because of his privilege against self-incrimination.

At that point, a district judge performs the ministerial act of signing the immunity order. *In re Corrugated Container Antitrust Litigation* (2nd Cir.1981) 644 F.2d 70, *In re Daley,* (7th Cir.1977), 549 F.2d 469. The order typically tracks § 6002 and says that "no testimony or other information compelled under the order ... may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." This was the statute which was analyzed in *Kastigar v. United States* (1972), 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212, in which the old case of *Counselman v. Hitchcock* (1982) 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110, was explained and distinguished. In *Kastigar* it was held that the statute did not grant transactional immunity and that the grant was limited to use. "The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute, like the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources." When the statute is followed, there is a formal, understandable record of the immunity granted and its extent, but, with pocket immunity, no one is sure what the deal is, and there is no adequate record—statistical or otherwise. An underlying purpose of the statute is to reduce to written record the identities of persons granted immunity to permit necessary comparison at a later time of their relative guilt, as compared with persons not let off the hook. With the informal pocket immunity, only a few of the grants come to light, and clear Congressional purpose behind the law is defeated. The statute cannot be read to mean anything other than a limitation on immunity grants to requests made by a "United States Attorney", approved by "the Attorney General, the Deputy Attorney General, or any assistant Attorney General". Congress did not delegate to Tax Division Assistants any right to formally or to informally deal out immunity to the objects of their bounty, but here persons identified as targets of the grand jury were later bargained out of the case by Messrs. Snyder and Blondin. Whether there was any approval of the gifts of pocket immunity, and if so, by whom, I know not, but I do know that there was not compliance with 18 U.S §§ 6002-6003, and I do know that the U ed States Attorney did not authorize pocket immunities granted by Tax Division lawyers.

This is especially troublesome in this case in light of the record made concerning the witness Richard Bell who was allegedly targeted by the grand jury (or at least by Mr. Snyder and Mr. Blondin). Mr. Bell was represented by his brother, Malcolm, an attorney practicing in New York City, and a witness I found to be straightforward, fair, convincing, and most generous to Mr. Snyder. Malcolm Bell succumbed to the carrot of pocket immunity for his brother, but, later he was told by Mr. Snyder that if Richard "testified for Mr. Kilpatrick, all bets are off." Maybe this meant that if Mr. Bell perjured himself he would be prosecuted for perjury, but if the immunity statute had been followed, the nagging question of the meaning of "all bets are off" wouldn't confront us. Under the statute, all bets weren't off if Richard Bell testified for Mr. Kilpatrick, although he could have been prosecuted for perjury if he testified falsely, but incriminating testimony given by him couldn't be used in a prosecution of the charges with which he was threatened. If the statute had been followed, the government couldn't welch on the bet of not using any incriminating mony and I doubt that it can welch bet when the immunity grant is in p form. All too often, pocket immunities are carelessly granted, and sometimes they grant transactional immunity which Congress has not authorized. It is not surprising that there was uncertainty and misunderstanding in this instance. Grand jurors can't be expected to know the requirements of law concerning lawful immunity grants, and if the prosecutor ignores the statute, the grand jury should be told that witnesses are testifying under a side deal made with the witness by the prosecutor. The nature and informality of the immunity grant might bear on a grand juror's evaluation of the credibility of a witness, especially if the grand juror knew of the short cut used by the prosecution.

nes Treece is a former United States rney for the District of Colorado. He was representing one of the targets of the grand jury investigation, and he was served with a subpoena duces tecum to produce records before the grand jury. He told the IRS Special Agent/Grand Jury Agent/Assistant to the prosecutor who served him that he had no such records in his possession, to which the agent, speaking in which capacity I know not, responded, "You're a liar." I guess that at this point this "man of many occupations" decided to act as a grand juror and pass on credibility. That this was said is denied, but I cannot disregard the testimony. I have no knowledge that any such comment was communicated to the grand jury, but Mr. Treece was required to testify after being called a liar by the "grand jury agent", and although I doubt that Mr. Treece was intimidated, other witnesses would have been.

We have not one but two problems under *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246. With full knowledge that he was represented by counsel, Declan O'Donnell appeared before the grand jury against the advice of his counsel, and that advice was known to the prosecutors. The government argues that O'Donnell was a lawyer and that he ap- d voluntarily. I don't think that this answer to *Massiah*, although I con- that the case deals with an indicted defendant and O'Donnell was not then indicted. The government excuses its conduct saying it is permitted under *Edwards v. Arizona*, 451 U.S. 477, 478, 101 S.Ct. 1880, 1881, 68 L.Ed.2d 378. I don't think that *Edwards v. Arizona* is apposite. That case has to do with *Miranda* rights, and, although the government asks that I read footnote 9 of the opinion, I think that footnote 8 has more to do with the *Massiah* problem. I do not rule that there was or was not a violation of *Massiah* in the case of Mr. O'Donnell's testimony before the grand jury because such a ruling is not necessary to this memorandum, but defendant's argument isn't frivolous.

Robert G. Morvillo is a prominent lawyer practicing in New York City, and his testimony was taken by telephone. He represented the Bank of Nova Scotia, and he testified concerning the activities of Mr. Scharf in going to Puerto Rico to play cop in a further and total blurring of the distinction between prosecutor and investigator. In its brief, the government sees no impropriety in this conduct, but I remind of the Advisory Committee's comment that "Federal crimes are 'investigated' by the FBI, the IRS or by Treasury Agents and not by *government prosecutors* or the citizens who sit on grand juries." (They surely aren't investigated by "reviewers", something next to be discussed) In any event, I have no doubt that when a prosecutor turns cop, he loses his *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 prosecutorial immunity.

While in Puerto Rico, Mr. Scharf conducted a surveillance of some little girls and tailed them to their home. This let him question their mother as to the whereabouts of his prey who happened to be her husband, and who is a Bank of Nova Scotia employee. Of course, Mr. Scharf must have known that the wife couldn't have been compelled to testify to her husband's whereabouts, even under the lessened privilege adopted in *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186. As an investigative technique tailing the little girls and quizzing the wife may have been brilliant police work, but I am quizzical as to the propriety of a lawyer questioning someone he knows he couldn't question in court because of an absolute privilege which, according to *Trammel*, can be waived only with full knowledge of the incompetence to testify. It seems to me that whatever may be the obligations of an IRS agent, a prosecutor owes a duty not to question a wife about her husband's whereabouts unless *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 has been overruled, and it hasn't been. Totally apart from the propriety of Mr. Scharf's actions in Puerto Rico under *Trammel*, the witnesses were employees of the Bank of Nova Scotia, well known to Mr. Scharf to be represented by Mr. Morvillo. He says that interviews conducted by Mr. Scharf violate *Massiah;* the government says they don't, and I express no judgment as to who is right or wrong, but, undeniably, there is a problem, and I think that the problem was well known to Mr. Scharf when he visited Puerto Rico.

Next we come to still another confusion in who occupied what job. It seems that within the administrative procedures of the Department of Justice sometimes conferences can be arranged with "reviewers" who are higher ups in the Tax Division. Many lawyers are of the impression that the "reviewers" occupy a sort of quasi-judicial capacity to pass judgment on whether a case should be prosecuted, and that they are pretty much like the Appellate Staff on the civil side of the Tax Division. Experienced tax lawyers think that a "reviewer" is someone with whom compromise can be discussed. Moreover, from time immemorial, lawyers have dealt with one another in trying to settle cases in the belief that they can be straightforward without having their words thrown back at them at time of trial. The IRS hasn't always shared this view, and problems with the IRS played no small part in the enlargement of the coverage of the common law rule by the enactment of Rule 408 of the Federal Rules of Evidence. That rule now provides, "Evidence of conduct or statements made in compromise negotiations is likewise not admissable."

During the troubled history of this case, some lawyers were and some were not afforded the luxury of a conference with a "reviewer". Experienced tax lawyers think that a conference with a Reviewer offers a last ditch opportunity to avoid a criminal prosecution through negotiation, and memoranda are submitted to the Reviewer to analyze defense counsel's legal position. Conferences are then set up, attended by IRS agents, trial attorneys for the government, and defense counsel to present arguments pro and con for more or less impartial consideration by the Reviewer. Counsel for some targets were and some were not favored with a conference with a Reviewer, but those who were so favored met with one Jared Scharf acting as the Reviewer. Something which was not disclosed to defense counsel was that he was a behind the scenes prosecutor, and, not only was he a behind the scenes prosecutor, he was actually an investigator in the case.

Rule 6(e) says that the grand jury transcript shall "remain in custody or control of the attorney for the government". The transcript of this grand jury was in the custody and control of the IRS. After the indictments were handed down, the transcript was stored away from the United States Courthouse in a room obtained from the General Services Administration by the Internal Revenue Service. It was a room assigned to the IRS, and, if the United States Attorney wanted in, he would have had to get a key from the IRS Special Agents. One cannot help fretting about this violation of the express language of the rule, and *United States v. Sells Engineering, Inc.*, — U.S. —, 103 S.Ct. 3133, 77 L.Ed.2d 743, coupled with *United States v. Baggot*, — U.S. —, 103 S.Ct. 3164, 77 L.Ed.2d 785, decided a few weeks ago, don't lessen the concern as to why the IRS retained custody of the transcripts which the rule unambiguously says should be under the control of the United States Attorney and only the United States Attorney.

There is testimony that Mr. Snyder threw his jacket on the floor and mouthed obscenities at me as I left the bench. I didn't see anything like that, and the conduct is denied. I don't know whether he did or didn't do any such thing.

When I recessed court one day, the players were in their usual positions. Mr. Snyder, Mr. Blondin, Ms. Surbaugh, and an IRS agent were seated at plaintiff's table. Mr. Scharf was in his bleacher seat, a couple of rows back in the spectator's section where he always sat while the jury was in the courtroom. It was only when the jury left the courtroom that he sat at the counsel table and became an active trial participant. Because of suspicions I had based on testimony in the case (suspicions enhanced by post trial testimony) I was concerned about possible violations of *Massiah*, and I cautioned one and all that I didn't want the rule violated. I started to leave the bench, and Mr. Scharf yelled at me (he says that he spoke in a loud voice, but the dictionary I have suggests that the difference between a loud voice and a yell is quibble). Mr. Scharf's discourtesy amused me more than it offended me, but, according to that which has been said in the post trial hearings, members of the public were distressed that a government lawyer would shout at the judge from the spectator's section of the courtroom. I thought that my court reporter's comment as we left the courtroom was discerning. She said that if her five year old son did something like that he would be sent to bed without his supper.

Rule 6(e) was amended to change the procedure for disclosure of grand jury information to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce the criminal law." No court permission for the disclosure is required, and the rule is complied with if the attorney for the government "promptly provide(s) the district court ... with the names of the persons to whom such disclosure is made." As I read it, any "attorney for the government" can promptly provide the information, and any "attorney for the government" can make the decision to disclose. I have no fault to find with the paper trail left in this matter insofar as the disclosure requirements are concerned. I am troubled about testimony suggesting that authority to make the disclosure decisions was delegated to the IRS Special Agent/Grand Jury Agents/Prosecutor's helpers. Under common law rules of agency, this authority couldn't be delegated to a subagent, and, especially it couldn't be delegated to an IRS agent whose fellow workers were aiming at the defendants from a different angle. My worry on this score is not lessened by an IRS letter in evidence saying that making a civil tax case under the administrative process would be difficult. *United States v. Sells Engineering* and *United States v. Baggot*, both *supra*, which settle the question of using a grand jury to collect taxes.

At the post trial hearing, Donald D'Amico, a witness called by the government, testified as to his appearance before the grand jury. He said that in the presence of the grand jury, Mr. Snyder threw his arm around his shoulder and whispered, "Don't let them cut you up." Then Mr. Snyder introduced him to the grand jury with a glowing recitation of Mr. D'Amico's war record and said, "We have a genuine war hero." After that, Mr. Snyder read off a list of names and asked if the witness would take the Fifth Amendment if inquiry was made concerning those persons. Upon receiving an affirmative answer, the witness was excused from further testimony, and it was not until the post trial hearing that Mr. D'Amico received oral pocket immunity. From what was said at the hearing I glean that counsel for Mr. D'Amico had discussed the grand jury testimony before the witness was called, and why he was called just to claim his privilege remains unexplained.

Bernard Ballor was called as a witness by the government. He is a lawyer of long experience with the Tax Division of the Department of Justice, and I was impressed with his knowledge and with his candor. He said that if a case is being prosecuted by a United States Attorney, it is not unheard of to have a Reviewer assigned to assist in a trial if the United States Attorney so requests, but that when a case is being prosecuted by Tax Division lawyers, it would be most unusual to have a Reviewer act as a trial attorney. He also summarized the security given grand jury material in a major case he handled, and that security was far greater than the security in this case. He made the statement that abuse of the grand jury process should bring about a dismissal of the indictment.

[1] I think that I have talked enough about the grand jury to explain why I think there has been more than an "adequate showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." There is such a motion, and, accordingly, I act under the provisions of Rule 6(e)(3)(C) which says that disclosure of grand jury matters may be made "when permitted by the court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." The Advisory Committee note to Rule 6 requires a "preliminary factual showing of serious misconduct" and I am convinced that the requirement has been met. I guess that technically, the requisite "request" to examine the entire grand jury transcript hasn't been made, but in light of this memorandum, I am sure that it will be. I have scanned the transcript, but I haven't had time to study it, and, even if I had the time, nuances recognizable by counsel wouldn't be apparent to me. Because of the showing made as to the claims of prosecutorial conduct, and without finally ruling that there was or was not any such misconduct, I order that the entire grand jury transcript dealing with this indictment be made available for study by defense counsel. Defense counsel say that a grand juror who is also a lawyer, if permitted, would testify that Mr. Snyder oppressed witnesses before the grand jury and that he was overbearing and discourteous. I leave to another judge to decide whether this evidence should be received.

The rule says, "If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct." The conditions follow: Disclosure shall be made to counsel and only to counsel. Paralegals shall not be used as substitute lawyers, and only members of the bar shall examine the transcript. They shall hold secret matters they learn, and they shall discuss them with no one other than co-counsel, and, insofar as necessary to the preparation of their arguments, with their clients. " ists given direct or indirect informa concerning the content of the transcript shall receipt for a copy of a written order commanding that they hold secret any information learned by them as to what took place before the grand jury, and those receipted orders shall be filed with the clerk. During the time a transcript is being used to prepare arguments in this case, counsel shall be personally responsible for its secrecy, and when not in actual use, the transcript shall be placed in locked storage to which only counsel have access. When need for the transcripts no longer exist, all copies of it shall be returned to the United States Attorney to remain in his custody and control. All briefs disclosing grand jury testimony shall be sealed.

I make this ruling because I think that disclosure of the transcript is necessary in the interest of justice, and I make it because of recent action by the United States Court of Appeals for the Tenth Circuit. I also have in mind that which I anticipate the future holds in store for me. I noted earlier that Judge Kane has dismissed all except one count of the indictment, and the government has appealed his ruling. Because the prosecutorial misconduct, if proven, may result in a dismissal of the entire indictment, the Court of Appeals has ordered a partial remand to permit full opment of the facts by all defendant remand is of such recent date that [illegible] defendants cannot be adequately prepared, and they should be permitted to participate in the matter to whatever extent they desire. They may be satisfied with the record made, or they may want to expand on it. Even defendant Kilpatrick's lawyers may want to expand the record after reading the full transcript. I cannot, and I do not rule on the motion to dismiss. I earlier asked for suggestions as to remedy, and the government has said that such suggestions are premature. I think that is correct. Dismissal is a possibility under a theory of a totality of the circumstances, and it is because proof of repeated misconduct is necessary to order dismissal that I have discussed the many accusations. See, U.S. v. *Gold*, (1979) D.C.Ill. 470 F.Supp. 36. But dismissal is a last resort seldom used. *U.S. v. Narciso* (1976) D.C.Mich. 446 F.Supp. 252. Contempt is a possibility, and it is the remedy usually suggested. See, *U.S. v. Hoffa* (6th Cir.1965) 349 F.2d 20, *U.S. v. Dunham Concrete Products* (5th Cir.1973) 475 F.2d 1241, *U.S. v. District Court* (4th Cir.1956) 238 F.2d 713. Disciplinary proceedings are a possibility, and the government has advised that "all of the allegations under consideration have been referred to the Office of Professional Responsibility" of the Department of Justice. Our local committee on conduct would also have jurisdiction of some of the matters.

Because further hearings are essential to a ruling on the motions to dismiss, and, perhaps, because Rule 605 of the Rules of Evidence, but more importantly because I plan to quit the judging business before the hearings can be completed, I make no ruling on and I intimate no belief as to what should be done with the dismissal motions. This decision will have to be made by Judge Kane, as will all other decisions concerning remedy.

No defendant other than defendant Kilpatrick is interested in the motion for new trial, and I am the only judge who should rule on it because I was there and watched mazement the trial's conduct. But lit- iscussion is necessary to this ruling. I e talked about the testimony of Richard Bell and his brother. I heard that testimony outside the presence of the jury, and I wouldn't let the jury hear it. I think that was an error, and I don't think that I should put the parties to the expense of having the Court of Appeals tell me it was error. The witness was a key to the prosecution's case, and testimony as to the alleged pressures was important to an evaluation of his credibility. The pocket immunity and the circumstances of its grant bear on credibility. I initially thought that the testimony went only to prosecutorial misconduct which is for the court to determine, and I overlooked the credibility aspect of the implied threat coupled with the pocket immunity grant just as I overlooked the right of the jury to know that immunity wasn't granted the way Congress says it shall be. The jury should have heard the testimony and it might have changed some juror's mind. As a trial lawyer I didn't like the phrase "harmless error", and as a trial judge I don't use it when the error has any substance at all. This error has substance.

[2, 3] One Wilson Quintela was subpoenaed by the government, and he was arrested as a material witness. The prosecutors exercised a power possessed only by the court, and they released the man from subpoena. He promptly returned to his home in Brazil. Lawyers can't substitute themselves for the court to release a witness from subpoena. *U.S. v. Sanchez* (2nd Cir.1972) 459 F.2d 100. At the time of trial, the government admitted that their conduct was in error, and every effort was made to get the witness to come back from Brazil when defense counsel said that he was relying on the availability of the witness. After the trial started, the government said that the witness would return, but defense counsel said at that point he had developed his trial strategy on the basis of the release of the witness from the subpoena. He may have correctly thought that an interruption of the trial to permit travel from Brazil would be detrimental. That the government was guilty of no evil intent I am sure, but that the defendant suffered no harm I am not sure. Standing alone, this is one mistake I might reluctantly say was "harmless error", but coupled with other things, I can't so rule.

If there is any one thing that Tenth Circuit has been vehement about it is expressions of personal opinions by counsel as to whose testimony they believe. That rule was violated here, and I suggest that a review of the grand jury transcript may show frequent violations of the rule during grand jury proceedings. My thinking on this score goes immediately to the appearance of Professor Hjorth before the grand jury. I jumped in during final argument to try to lessen the error of the comment, but I doubt that I cured it.

It is argued that in the presence of the jury one of the agents stared at and laughed at the defendant. The prosecution says that this didn't happen, and that if it did, I would have seen it. I didn't see it, but that doesn't mean that it didn't happen, because no judge sees everything which goes on in a courtroom. This is especially so because I was concentrating my attention on Mr. Scharf's glowering as he sat in the second row of the spectator's section, and I doubt that defense counsel could see him. I mention this only because it is one more tiny aspect of the atmosphere of the trial. It was an atmosphere of unfairness and overreaching illustrated in small degree by ex parte telephone calls to my law clerk made by government counsel inquiring through the back door to learn my thinking as to some legal situations in the case. (Colloquy about this appears in the record, and, consistent with their denials of what so many others say, government counsel deny my law clerk's statements as to the conversation.) The case is the only trial I have ever conducted in which the courtroom deputy complained about discourtesy on the part of counsel, and I suppose that it goes without saying that it was not defense counsel who were discourteous. (An apology by government lawyers was extended later.)

Other arguments are advanced supporting the new trial motion, but I don't think that I need extend this opinion by discussing them. I have taken them into account in my thinking. Usually, when a case goes to the jury, there are no more difficulties to be encountered, but that's not so in this ill-starred case which had its first questionable conduct during the opening two minutes of grand jury investigation and which had conduct suspect under the Canons of Professional Responsibility lasting into post trial hearings. While the jury was deliberating a note was received. I notified counsel on both sides, and a hearing was held in open court with the defendant present, defense counsel present. Ms. Surbaugh of Colorado's United States Attorney's Office, and Mr. Blondin were there on behalf of the government. (Messrs. Scharf and Snyder didn't show up, although when the jury retired all counsel had been told to stand by for jury questions or a verdict). We discussed the answer which should be given to the jury, and we all agreed on it. The answer was written, and a copy was given to both sides.

I was more than a little surprised when a telephone call from Mr. Scharf was received a few minutes later. He had decided that he wasn't satisfied with that which those who saw fit to come to the hearing all agreed to. He demanded a further hearing, and I told him we would have one right away. He then made the most ridiculous demand I have ever heard in the almost 50 years since I graduated from law school. Mr. Scharf directed that I instruct the jury to "cease its deliberations" until he could have his hearing. This direction was made on the telephone and it was obviously not made in the presence of defendant or defense counsel. To accede to this absurd demand would have created irretrievable error under Rule 43 and under *Rogers v. United States*, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1. That error I avoided because I told Mr. Scharf I wouldn't even consider obeying his command to instruct the jury to quit deliberating. We did have the hearing and it didn't take long. Exactly what was said at that time is part of the record in the case.

After the jury verdict, timely motions were filed, and it was apparent from a reading of them that Mr. Scharf, Mr. Blondin and Mr. Snyder were going to have to testify about matters raised in the motions. Their recognition of the factual dispute is clearly shown in the flippant brief filed in opposition to the motions. At the outset of the hearing I inquired concerning the ethical bind in which the prosecutors found themselves, and I asked if other counsel should not be handling the hearing. I admit to surprise when I was told that top lawyers in the Tax Division of the Department of Justice saw nothing wrong with the continued participation in the case of lawyers whose testimony was quite obviously going to be required. We started the hearing with participation by two of the lawyers who were essential witnesses. (One was said to be in trial somewhere else.) The hearing went for a little while, when, suddenly, there was a 180 degree change of direction, and government counsel announced that they wanted to withdraw. They were permitted to do so, and the hearing recessed. Mr. Alexander took over, and he has performed ably and ethically. However, he was handicapped by lack of time to prepare, and the hearing which I had hoped to complete weeks ago had to be continued for later testimony. We are still waiting for that testimony.

This brings us down to date. I have already explained that I cannot and I do not rule on the motion to dismiss, but I do grant the motion for a new trial. I deny the motion for judgment of acquittal, but I do so without intent that this is the "law of the case", and leave it to another judge to take a fresh look at the motion if the case is tried again.

## ORDER

Rule 6 of the Federal Rules of Criminal Procedure provides that matters occurring before a grand jury shall be secret, subject to a few exceptions. One exception is that there may be disclosure when directed by a court in connection with a judicial proceeding. I have directed that there be some disclosure of grand jury matters, and undoubtedly, typists will have to learn what is contained in grand jury transcripts in the performance of their secretarial work for lawyers who read the transcripts. Accordingly, such disclosures as may be necessary to the accomplishment of secretarial duties is authorized, but any typist who so learns of any such grand jury matters is ordered to keep secret such information. Rule 6 itself provides that violation of the secrecy requirements of the rule may be deemed contempt of court, and violation of this order may be deemed contempt of court.

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## In re KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983.

No. 565.

Judicial Panel on Multidistrict Litigation.

Nov. 16, 1983.

The Judicial Panel on Multidistrict Litigation ordered 42 actions arising out of Korean airline disaster of September 1, 1983 centralized in the District of Columbia for coordinate or consolidated pretrial proceedings.

Order accordingly.

**Federal Courts 🔑154**

Inasmuch as several government agencies located in or near District of Columbia would likely be principal targets of discovery, and inasmuch as Korean airline disaster of September 1, 1983 and resultant litigation implicated sensitive areas of national policy, international relations and military intelligence, the District of Columbia was the proper district for centralization of discovery in 42 actions pending in eight districts, which actions shared numerous fact questions. 28 U.S.C.A. § 1407.

Before ANDREW A. CAFFREY, Chairman, ROBERT H. SCHNACKE, FRED DAUGHERTY, SAM C. POINTER, JR., S. HUGH DILLIN, MILTON POLLACK,* and LOUIS H. POLLAK, Judges of the Panel.

## TRANSFER ORDER

PER CURIAM.

This litigation consists of 42 actions pending in eight districts as follows:

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| Southern District of New York | 15 |
| District of the District of Columbia | 8 |
| Northern District of California | 7 |
| Eastern District of New York | 6 |
| Eastern District of Michigan | 3 |
| Northern District of Illinois | 1 |
| District of Massachusetts | 1 |
| District of New Jersey | 1 |

Presently before the Panel are one motion and two cross-motions, pursuant to 28 U.S.C. § 1407, to centralize actions in this litigation in a single district for coordinated or consolidated pretrial proceedings. Defendant Korean Air Lines Co., Ltd. (KAL) has moved to centralize actions in the District of the District of Columbia. Defendant The Boeing Company (Boeing) has submitted a cross-motion seeking to centralize actions in the Western District of Washington. Plaintiffs in eleven actions have submitted a cross-motion seeking to centralize actions in either the Southern District of New York or the Eastern District of New York.[1] In addition to movant KAL, plaintiffs in twelve actions and defendant the United States favor transfer to the District of the District of Columbia. In addition to cross-movant plaintiffs, plaintiffs in two actions favor transfer to either the Southern District of New York or the Eastern District of New York; defendant Litton Industries, Inc. and plaintiffs in seven actions favor transfer to the Southern District of New York. Plaintiff in one California action favors transfer to the Northern District of California. No responding party has opposed centralization.

On the basis of the papers filed and the hearing held, the Panel finds that these 42 actions involve common questions of fact and that centralization under 28 U.S.C. § 1407 in the District of the District of Columbia will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. The actions share numerous factual questions concerning the circumstances of the air disaster involving KAL Flight 007 on September 1, 1983. Centralization und Section 1407 is thus necessary in order eliminate duplicative discovery, prevent i consistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary.

None of the five forums suggested by the parties as potential transferee districts could be characterized as the nexus of this litigation involving an overseas air disaster. On balance, however, we are persuaded that the District of the District of Columbia is the appropriate transferee forum. Several governmental agencies located in or near the District of Columbia will likely be principal targets of discovery in these actions. Moreover, this air disaster and the resultant litigation implicate sensitive areas of national policy, international relations and military intelligence. These considerations, we find, favor selection of the District of the District of Columbia as the transferee court. *See In re Air Crash Disaster near Saigon, South Vietnam, on April 4, 1975*, 404 F.Supp. 478, 480 (Jud. Pan.Mult.Lit.1975).

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, the actions listed on th following Schedule A and pending in districts other than the District of the District of Columbia be, and the same hereby are, transferred to the District of the District of Columbia and

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* Judge Milton Pollack took no part in the decision of this matter.

[1] The Panel has been advised of the pendency of several recently filed related actions. These actions will be treated as potential tag-al tions. *See* Rules 9 and 10, R.P.J.P.M.L., F.R.D. 273, 278-80 (1981).

APPENDIX A—Continued

s "deemed" to have waived any objection to the motion. If a party fails to comply with Local Rule 19(c), the effect is the same as if he had affirmatively consented to granting of the motion. Local Rule 19(c) gives parties clear and unambiguous notice of their obligations and of the consequences of noncompliance. The Rule gives fair warning that failure to object within ten days communicates waiver of all objection to the Court, just as written objection within ten days communicates intent to contest a motion.

Failure to file notice of objection to a motion, which triggers the deemed waiver under Local Rule 19(c), is distinguishable from the situation in which a party gives notice of its opposition, as required by Lo- Rule 19(c), but fails to present any rtions, affidavits, memoranda or other erials in support of its position. In the latter situation, the Court is required by Rule 56 to examine the motion on the merits. In the former situation, the Court is entitled to treat the party's inaction as a waiver of objection and to grant it without considering the motion on its merits.

As a rule regulating motion practice, Local Rule 19(c) does not purport to alter the Court's obligations with respect to a motion for summary judgment or any other motion made under these rules; its operation is not affected by the character of the underlying motion.

Plaintiff cites *Hamilton v. Keystone Township Corporation*, 539 F.2d 684 (9th Cir.1976) (*per curiam*) in support of his position. In *Hamilton*, the District Court granted summary judgment to the moving party on the grounds that the opposing party failed to comply with certain local rules. The Ninth Circuit, without specifically discussing the deemed consent provision, interpreted the local rules as follows:

> As we read Local Rule 3, that rule does not require entry of a summary judgment on behalf of the moving party in absence of opposition, affidavits or statements of genuine issues of fact by the opponent, where the movant's papers on their face are clearly insufficient to support a motion for summary judgment and where, as here, those papers themselves suggest the existence of a genuine issue of material fact.

*Id.* at 686. *Hamilton* is of limited usefulness as persuasive authority for at least three reasons. First, the Ninth Circuit's decision was based on an interpretation of the local rules that is at variance with this Court's interpretation of Local Rule 19(c) in *Picucci, supra, Broussard, supra*, and *Gagne, supra*. Thus, the Court failed to reach the issue presented here. Second, the deemed consent provision of the local rules was only one of at least two grounds for the decision, and the Court of Appeals did not discuss them separately. Third, the brief *per curiam* opinion in *Hamilton* did not undertake to analyze the purposes and policies of the local deemed consent provision *vis-a-vis* the purposes and policies of Rule 56. The Ninth Circuit did not examine the distinction between lack of contest on the one hand, and deemed waiver or deemed consent on the other.

Thus, it is possible to find that a strict construction of Local Rule 19(c) does not conflict with Rule 56. However, this approach is unnecessary effectively to achieve the purposes of Local Rule 19(c) where the initiating motion is one for summary judgment under Rule 56.

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**UNITED STATES of America, Plaintiff,**

**v.**

**William A. KILPATRICK, Declan J. O'Donnell, John Pettingill, Sheila C. Lerner, Michael L. Alberga, C.S. Gill, C.M. Smith, Bank of Nova Scotia, Defendants.**

Crim. No. 82-CR-222.

United States District Court,
D. Colorado.

Sept. 24, 1984.

Defendants were charged with conspiracy, mail fraud, and tax fraud, and one defendant with obstruction of justice. The United States District Court for the District of Colorado dismissed all except one count, and the Government appealed. The Court of Appeals, after briefing but before oral argument, partially remanded case for determination of whether prosecutorial misconduct and irregularities in grand jury process constituted additional grounds for dismissal. Before and immediately after the partial remand, the District Court, 575 F.Supp 325, Fred M. Winner, Senior District Judge, ordered that the Government provide defendant with copies of transcripts of all grand jury proceedings. On remand, the District Court, Kane, J., held that indictment had to be dismissed because of totality of circumstances, which included numerous violations of federal criminal rule pertaining to grand juries, violations of statutory witness immunity sections, violations of the Fifth and Sixth Amendments, knowing presentation of misinformation to the grand jury and mistreatment of witnesses.

Indictment dismissed.

**1. Grand Jury 🔑23**

Prosecutor's description to grand jury of role of "grand jury agent" in connection with office of "agent of the grand jury" created for Internal Revenue Service special agents misled grand jury, which was consistently reminded of agents' uniquely created and described role and urged to rely on special agents as their "agents," as to appropriate role of IRS agents in investigation in violation of criminal rule relating to grand juries, especially since agents did not view their role and conduct their investigation as agents of independent unbiased grand jury. Fed.Rules Cr.Proc.Rule 6, 18 U.S.C.A.

**2. Grand Jury 🔑41**

Responsibility and decision-making authority that criminal rule relating to grand juries vests in government attorneys was relinquished to and exercised by Internal Revenue Service, which undertook policy of determining whether and to whom disclosure of confidential grand jury material would be made and whether notifications of disclosure would be made. Fed.Rules Cr.Proc.Rule 6(e), 18 U.S.C.A.

**3. Grand Jury 🔑41**

Disclosure of grand jury information is only one of forbidden purposes and it is equally improper to manipulate grand jury investigation to obtain evidence for eventual civil use by the Internal Revenue Service. Fed.Rules Cr.Proc.Rule 6(e)(3), 18 U.S.C.A.

**4. Grand Jury 🔑41**

Government's publicizing of names of individuals and entities that were being investigated as well as nature of grand jury's inquiry breached grand jury rule's imposition upon government attorneys of obligation to secure grand jury information from improper disclosure. Fed.Rules Cr.Proc.Rule 6(e), 18 U.S.C.A.

**5. Grand Jury 🔑41**

Government's imposition of unauthorized secrecy obligations upon two witnesses, in order to prevent suspects from determining nature and extent of any communication that might have been revealed and to foreclose challenge to testimony based upon applicable privilege, violated a grand jury rule. Fed.Rules Cr.Proc.Rule 6(e)(2), 18 U.S.C.A.

**6. Grand Jury 🔑36**

General instructions, months prior, that grand jurors not draw inferences from individual's invocation of privilege against self-incrimination cannot correct practice of calling witnesses only to have them invoke their Fifth Amendment privilege before the grand jury. U.S.C.A. Const.Amend. 5.

**7. Grand Jury 🔑1**

Most important function of grand jury is to stand between government agents and suspect as unbiased evaluator of the evidence.

**8. Grand Jury 🔑39**

**Indictment and Information 🔑144.1(2)**

Events which occurred in grand jury room while special agents assigned by Internal Revenue Service to assist prosecutors were present as "agents" of the grand jury and not under oath as witnesses under examination violated grand jury rule provision concerning who may be present before grand jury and required dismissal of indictment charging conspiracy, mail fraud, tax fraud and obstruction of justice. Fed. Rules Cr.Proc.Rule 6(d), 18 U.S.C.A.

**9. Indictment and Information ⇐144.1(2)**

When grand jury provision concerning secrecy is violated recklessly and systematically, dismissal of indictment is appropriate; when knowing violations of rule prejudice and embarrass targets whose identities the government reveals, contempt remedy is not always wholly adequate and under those circumstances it is not necessary for defendant to show that he has been prejudiced by violations. Fed.Rules Proc.Rule 6(e), 18 U.S.C.A.

**ndictment and Information ⇐144.1(2)**

Violations of grand jury secrecy requirements and direction to witnesses not to disclose fact or substance of their grand jury testimony based on prosecutors' relinquishment to Internal Revenue Service of their responsibility to determine persons to whom disclosure would be made, and IRS's failure to provide mandated prompt notification of disclosure and improper manipulation of secret material to obtain information and data for use during civil litigation required dismissal of indictment charging conspiracy, mail fraud, tax fraud and obstruction of justice. Fed.Rules Cr.Proc. Rule 6(e), (e)(2, 3), 18 U.S.C.A.

**11. Witnesses ⇐304(1)**

Practice of bestowing informal or pocket immunity through letters of assurance rather than following congressionally authorized procedure for conferring grants of immunity is illegal; when granting immunity, Department of Justice must comply with statutory requirements. 18 U.S.C.A. §§ 6002, 6003.

**12. Indictment and Information ⇐10.1(4)**
**Witnesses ⇐304(1)**

Prosecutors' repeated use of letters of assurance or so called "pocket immunity" for grand jury witnesses violated applicable witness immunity statutes and tainted grand jury indictment with its illegality. 18 U.S.C.A. §§ 6002, 6003.

**13. Indictment and Information ⇐144.1(2)**

Calling of seven witnesses before grand jury to take advantage of impermissible inferences that arose from their invocation of privilege against self-incrimination did not require dismissal of indictment per se but was a factor to be considered in determining whether grand jury had been overreached or usurped. U.S.C.A. Const. Amend. 5.

**14. Grand Jury ⇐36.4(2)**

Improper efforts to prejudice defendants by impermissible inferences from seven witnesses' assertions of their privilege against self-incrimination was compounded by questioning before grand jury concerning payment of witnesses' legal fees, since no legitimate purpose for such questioning exists. U.S.C.A. Const.Amend. 5.

**15. Grand Jury ⇐36.8**

Mischaracterization of testimony before grand jury and unidentified use of questionable hearsay information with regard to vital issues intrudes upon independent role of grand jury particularly where misrepresentations could not be expected to be readily apparent to grand jury and relate to material issues in prosecution.

**16. Criminal Law ⇐662.1**

Guarantees of Sixth Amendment apply to corporate defendants with same force as to individual defendants. U.S.C.A. Const. Amend. 6.

**17. Indictment and Information ⇐144.1(2)**

Dismissal of indictment was inappropriate remedy for *Massiah* violations as result of interrogations of bank employees in absence of counsel where bank's counsel performed ably and adequately throughout litigation and no prejudice was demonstrated, but *Massiah* violations entered into qualitative assessments of prosecutors' and grand jury's conduct in determining whether indictment should be dismissed based on totality of the circumstances.

**18. Indictment and Information ⚷144.1(2)**

Totality of circumstances concerning grand jury investigation, from inception of 20-month grand jury investigation when prosecutors divined office of "agent of the grand jury" on Internal Revenue Service agents through time agents' improper "summaries" were presented shortly before indictment was returned, usurped indicting grand jury and required dismissal of indictment charging conspiracy, mail and tax fraud, and obstruction of justice. 18 U.S.C.A. §§ 2, 371, 1341; Fed.Rules Cr.Proc.Rule 6, 18 U.S.C.A.

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Charles Alexander, Trial Atty., U.S. Dept. of Justice, Tax Div., Washington, D.C., and Robert N. Miller, U.S. Atty., Linda S. Surbaugh, Asst. U.S. Atty., Denver, Colo., for U.S.A.

William C. Waller, Richard K. Rufner, Wagner & Waller, P.C., Englewood, Colo., for Kilpatrick.

James L. Treece, Littleton, Colo., for O'Donnell.

David L. Hiller, Duboskey & Hiller, Denver, Colo., for John Pettingill.

Thomas French, Dill, Dill & McAllister, Denver, Colo., for Lerner.

Donald E. Van Koughnet, Naples, Fla., for Alberga & Gill.

C.M. Smith, No Appearance.

James E. Nesland, Ireland, Stapleton & Pryor, Denver, Colo., and Robert J. Anello, Obermaier, Morvillo & Abramovitz, New York City, for Bank of Nova Scotia.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

KANE, District Judge.

### PROCEDURAL BACKGROUND

After a twenty month investigation conducted before two successive grand juries, the instant proceeding was commenced on September 30, 1982 by the filing of a twenty-seven count indictment charging seven individuals and The Bank of Nova Scotia with conspiracy, mail fraud and tax fraud and also charging William A. Kilpatrick with obstruction of justice (Count 27). The bank was charged in ten counts with conspiracy to defraud (18 U.S.C. § 371) (Count 1) and aiding and abetting a mail fraud (18 U.S.C. § 1341 and § 2) (Counts 13 through 21).

On February 21, 1983, I dismissed the first twenty-six counts of the indictment for failure to charge a crime and as improperly pleaded. Additionally, upon separate motion by the bank I dismissed the charges in which the bank was named upon the ground that the indictment failed to allege that the bank or any of its representatives had the requisite knowledge and intent to commit the crimes charged. The government appealed the dismissals.

On August 5, 1983, after briefing but before oral argument, the Tenth Circuit entered an order partially remanding the case to me so that all defendants could participate in hearings to determine whether prosecutorial misconduct and irregularities in the grand jury process constituted additional grounds for dismissal.

Before and immediately after the partial remand by the Tenth Circuit, the Honorable Fred M. Winner, Senior United States District Judge, presided over post-trial motions hearings following a guilty verdict against Mr. Kilpatrick on Count 27. On August 25, 1983, at about the time of his retirement from the bench, Judge Winner issued a memorandum decision which, among other things, summarized the status of the hearings which were being reassigned to me. Further, Judge Winner ordered that the government provide defendants with copies of transcripts of all proceedings that occurred before the grand juries. After some bizarre episodes of procedural novelty, Judge Winner's opinion was finally published. *See United States v. Kilpatrick,* 575 F.Supp. 325 (1983). The instant Findings of Fact, Conclusions of Law and Order must be read in conjunction with Judge Winner's opinion.

The government attorneys failed to provide defendants with complete transcriptions as ordered. They apparently overlooked, and did not transcribe, dozens of proceedings before the grand jury. The latter proceedings—which converted into hundreds of pages of transcript and, more significantly, disclosed clear violations of Rule 6—were not produced until the defense detected the lack of compliance with Judge Winner's order. [redacted] The government asserts that it had turned over such transcripts as could be had as soon as they were received from the court reporter. Such, in my view, does not excuse the failure to produce complete and accurate transcripts. If the assertion minimizes the inference of dissimulation, it exacerbates nger ones of confusion and indiffer-

## FACTS ESTABLISHED BY THE RECORD[1]

### A. *Grand Jury Agents*

[1] Despite detailed instructions from the impaneling court that the grand jury should maintain its independence and not develop into a "prosecutor's agent," shortly after both grand juries involved in the investigation leading to the instant indictment were sworn, the prosecutors created the office of "agent of the grand jury" for Messrs. Mendrop and Raybin, Special Agents assigned by the IRS to assist the prosecutors.[2] Several months later an IRS agent assigned to the civil division and who the prosecutors relied upon as an expert was also sworn in as an "agent of the grand jury." G.J. Tr. Schneider, May 3, 1982, 1:34 p.m., at pp. 2–3. The prosecutors divined the office of "grand jury agent" by personally administering oaths before the grand jury to Raybin, Mendrop and Schneider.[3] The government concedes that the prosecutors possessed no authority to administer such oaths. Indeed, the prosecutor who administered the oaths now concedes he created the oath and was "shooting from the hip" when he did so. K.Tr. 501.

The government argues that this event should be viewed as a technical mislabeling of no great import. It is, however, more than a misnomer.

First, the prosecutor's description to the grand jury of the role of a "grand jury agent" clearly misled the grand jury as to the appropriate role of the IRS agents in the proceedings. *See* Winner opinion, 575 F.Supp. at 329. As conceded by the prosecutor, there is simply no basis for his description to the grand jury of the role of grand jury agents.[4] K.Tr. 501.

Second, the grand jury was consistently reminded of the agents' uniquely created and described role and urged to rely upon the IRS special agents as their "agents." Thus, on many occasions when Raybin and Mendrop appeared as witnesses the government attorney reiterated that they were appearing as "agents of the grand jury."[5] *See e.g.*, G.J. Tr. Mendrop, August 4, 1981, 9:25 a.m., at p. 2, August 5, 1981, 4:04 p.m., at p. 2, September 29, 1982, 9:32 a.m., at p. 2; G.J. Tr. Raybin, July 8, 1981, 9:11 a.m., at p. 5, March 3, 1982, 1:19 p.m., at p. 2, September 29, 1982, 2:32 p.m., at p. 2. Further, the government attorneys assigned special importance to identifying the IRS agents with the grand jury. When conducting interviews in connection with the investigation, Raybin and Mendrop were directed by the prosecutor to inform witnesses that they were "assisting a grand jury investigation in the Judicial District of Colorado." K.Tr. 419; *see also* G.J. Tr. Mendrop, August 5, 1981, 4:04 p.m., at p. 2; G.J. Tr. Raybin, July 8, 1981, 9:11 a.m., at p. 5, September 29, 1982, 2:32 p.m., at p. 2.[6]

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[1] The facts relied upon in this opinion are taken from voluminous transcripts of hearings before two grand juries, Judge Winner, and me and a trial before a jury. To aid the reader, the following citation form is used: references to the trial to the jury presided over by Judge Winner are cited as "T. Tr."; references to hearings on the motion for a new trial or acquittal and the motion to dismiss before Judge Winner are cited as "W. Tr."; and references to hearings on the motions underlying this order are cited as "K. Tr." Citation of the grand jury transcripts are captioned "G.J. Tr." and recite the relevant witness or declarant, the date and the time of the transcription. Defense and prosecution exhibits submitted on this matter are designated respectively "DX" and "PX."

[2] The government seeks to absolve the prosecutors of any misconduct by pointing to instances where the prosecutors themselves informed the grand jury of its independent and unbiased mission. *See, e.g.,* G.J. Tr. Remarks of Prosecutor, July 8, 1981, 8:39 a.m. at pp. 9, 11; October 6, 1981, 10:58 a.m., at pp. 2, 3; September 28, 1982, 8:52 a.m., at p. 8. Such admonishments, however, are not curative of actions taken at other times which constitute abuses of the system and impinge upon the grand jury's integrity.

[3] Agent Raybin testified that before Mr. Snyder gave him his oath as an agent of the grand jury, he was also sworn in by the foreman of the grand jury. K.Tr. 267.

[4] Snyder did suggest that the swearing in of grand jury agents was practiced in Atlanta, Georgia and the Southern District of Florida. He did not, however, testify as to what grand jury agents did in these other districts or whether the practices employed elsewhere were similar to those used here. K.Tr. 414–15.

Third, contrary to the role of the IRS agents described to the grand jury by the prosecutors, Mendrop and Raybin *did not* view their role and conduct their investigation as agents of an independent, unbiased grand jury. Rather, they viewed their role as agents of the Department of Justice, not the grand jury. When asked if his function as an agent of the grand jury was to assist the grand jury, Raybin testified:

> A: My duties were designed to assist the Department of Justice in its investigation....

K.Tr. 232.

Mendrop similarly interpreted his role as agent of the grand jury to be "primarily" to assist the prosecutors:

> Q: ... Mr. Mendrop, who were you really assisting in this matter during the grand jury investigation?
>
> A: Well, *primarily, I was assisting the attorneys for the government* and indirectly I'm sure that I must have been assisting the grand jury through the work that I was doing for the investigation that they were, that they had under consideration.
>
> Q: Well, in fact, you directly represented to the grand jury that you were assisting them, did you not, sir?
>
> A: I'm not sure how you mean that.
>
> Q: In fact, you represented to the grand jury that you were their agent and Mr. Snyder also represented to the grand jury that you were their agent; is that correct, sir?
>
> A: I believe those words were used, yes sir.

K.Tr. 401-02 (emphasis supplied).

Ironically, the government attorneys who created the grand jury agents and described their role are confused themselves as to whether the "agents'" roles should be considered aligned with that of independent grand jurors or the prosecutors.[7] K.Tr. 534-35; 1126.

Fourth, the government attorneys used the "grand jury agents" to do more than assist the attorneys in the investigation. They used them to summarize evidence in front of the grand jury. On the first day that the second grand jury convened, after his pseudo-investiture as a grand jury agent, Raybin summarized the investigation so far conducted, explained tax shelters to the jury, and opined that the circular financing utilized in the tax shelters under investigation was illegal. *See* G.J.Tr. Raybin, September 29, 1982, 2:32 p.m.; Mendrop, September 29, 1982, 9:32 a.m.; Raybin, September 30, 1982, 10:40 a.m. Similar kinds of substantive testimony were given by Raybin on September 9, 1981 and March 3, 1982. *See* G.J. Tr. Raybin, September 9, 1982, 10:02 a.m.; March 3, 1982, 1:19 p.m. On September 29 and 30, 1982, when the government attorneys, and apparently the "agents of the grand jury," were seeking the indictment, Raybin and Mendrop purported to summarize the evidence for the grand jury to support the 27 count indictment presented by the government attorneys. On September 30, 1982 Schneider appeared as "the expert" in the field of tax shelters to summarize the legal theory. G.J. Tr. Schneider, September 30, [illegible]2, 9:22 a.m. These summaries con[illegible]ed numerous inaccuracies and were [illegible]leading in several respects. Although the government attorneys were quick to inform the grand jury of their role as advocates, the grand jurors were never informed that their "agents" were "primarily" representing the interests of the Department of Justice attorneys.

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[5] On some occasions Mr. Snyder referred to Raybin and Mendrop as his agents. G.J. Tr. Remarks of Prosecutor, July 6, 1981, 8:39 a.m., at pp. 9, 15, 18, 21, 23; July 8, 1981, 12:05 p.m., at p. 5; August 5, 1981, 3:50 p.m., at p. 5; September 9, 1981, 8:37 a.m., at p. 2; September 9, 1981, 10:00 a.m., at p. 2; October 6, 1981, 10:58 a.m., at p. 12; May 3, 1982, 9:15 a.m., at p. 3. Such references did not, however, clarify the ambiguous role of the grand jury agents. As noted, the IRS agents were often referred to as agents of the grand jury. The confusion over the agents' role is discernible from isolated statements made by the prosecutors to the grand jury. Snyder, for example, said that he would, "have my agents, when I ask them to be sworn as agents of the Grand Jury, analyze [the documents] and basically figure out what they mean." G.J. Tr. Remarks of Prosecutor, July 8, 1981, 8:39 a.m., at p. 21; *see also* G.J. Tr. Remarks of Prosecutor, July 8, 1981, 12:05 p.m., at p. 5. The agents worked, in form, for the grand jury; but, in substance, they worked for the prosecution.

[6] Mendrop and Raybin claim that they never introduced themselves to witnesses as agents of the grand jury. K.Tr. 243, 266-67, 366-67.

[7] *See supra* note 5 and accompanying text.

Finally, the prosecutors' creation and use of grand jury agents resulted in many other abuses and Rule 6 violations. Most notably the agents made many joint appearances before the grand jury, without the presence of government counsel, and read transcripts to the jurors. K.Tr. 483–87; 636–39; 691–92; 707–12.

Raybin and Mendrop appeared before the second grand jury to give testimony regarding the investigation. Each time they appeared alone, were sworn, and were examined by the government attorneys. When they appeared to read testimony from the first grand jury to the second grand jury, they appeared together, were apparently not sworn, and were not examined by government attorneys because the latter were usually absent. It is not clear in what capacity they were appearing to read testimony. The confusion was exacerbated by two other IRS agents—Burke and Shea—also appearing together to read testimony to the second grand jury. In what capacity they were appearing is even less evident since they were not made "grand jury agents" and the record of their appearance does not support a finding that they were witnesses.

The transcripts of the agents' simultaneous appearances establish that they were not present as witnesses. They appear not to have been sworn; they appeared together; they were not examined; and they were mostly unaccompanied by government attorneys. The testimony of the prosecutors and agents that the agents were sworn, even if evidenced by a transcript, would not authorize their simultaneous appearances under Rule 6(d). The recollection of the prosecutors and agents that the oath was administered is challenged by the almost dozen transcripts showing the oath was not administered on any single occasion where the agents appeared together.

The record reveals that the agents' many appearances before the second grand jury, whether sworn or unsworn, were largely unsupervised. The agents were frequently unattended by government attorneys and, in some instances, may have convened the grand jury sessions without government counsel in order to read testimony. K.Tr. 483–87; 636–39; 691–92; 707–12.

In other instances the transcripts do not make clear precisely when the agents entered or left the grand jury room. It appears that they may have been present while the prosecutors engaged in colloquy with grand jurors. G.J. Tr. Remarks of Prosecutor, February 2, 1982, 1:07 p.m. at p. 18; Remarks of Prosecutor, February 4, 1982, 3:30 p.m. at pp. 2–3; Remarks of Prosecutor, April 6, 1982, 9:08 a.m. at p. 8.

Both prosecutors acknowledge that the agents "*were not* under examination" when they read to the grand jury. K.Tr. 485 (emphasis supplied); *see also* K.Tr. 707. The conclusion that they were not under examination is inescapable because no attorney was present to conduct an examination. Further, the grand jurors were under instructions *not* to question the agents during such appearances. K.Tr. 481–87.

### *B. Improper Disclosure, Improper Use and Secrecy Violations*

[2] During the course of the grand jury investigation, the government representatives systematically disregarded the strictures of Rule 6(e). The record demonstrates that the responsibility and decision making authority that Rule 6(e) vests in government attorneys was relinquished to and exercised by the Internal Revenue Service. Members of that agency undertook a policy of determining whether and to whom disclosure of confidential material would be made and whether notification of such disclosure would be made pursuant to the Federal Rules. Moreover, the evidence suggests that information was disclosed to other IRS agents for use in civil cases. Grand jury secrecy was repeatedly breached by those with a duty to remain silent and secrecy obligations were imposed upon others of whom the law does not require confidentiality.

#### *(1) Disclosure*

The disclosure notices filed pursuant to Rule 6(e)(3)(B) indicate that numerous individuals at all levels of the Internal Revenue Service, many of whom were assigned from the civil division of that agency, were permitted access to grand jury material. DX Q; *see* K.Tr. 26, 29–36, 40, 43, 50. The hearings have demonstrated that numerous other IRS personnel (all of whom were civil personnel), were given access to grand jury material, that these people were never identified on a disclosure notice and that they remain unknown even now.

That the decision as to which individuals should be privy to the grand jury material was frequently made by the IRS, rather than by the prosecutors, was admitted by the agents.[8] K.Tr. 241. That it was the norm is confirmed by several additional facts. Disclosure was made liberally and often before obtaining attorney approval, an act the prosecutors acknowledged violates Department of Justice rules. K.Tr 57–69; 754. Notice of such disclosure was not made "promptly" as required by Rule 6(e). The decision as to which names to include on the disclosure lists was largely left up to the IRS agents. The integrity of the lists themselves, as well as the decisions to make disclosure to the listed personnel, is lacking. The government attorneys admitted that they were unable to identify a substantial number of those named on the disclosure notices. K.Tr. 498–99. Further, these notices were frequently filed by attorneys having little relationship to the investigation. *See* K.Tr 15–67; DX Q. The IRS agents were likewise unable to identify many of the persons on the list or why they were listed. K.Tr. 14–22, 30, 36–38, 39, 43–44, 58, 60–61, 65, 99, 108–09.

Perhaps the best illustration of the insouciance with which grand jury disclosures were made and recorded appears in the circumstances surrounding the post-indictment notice. The agents were directed by the government attorneys to pick their brains and prepare a catch-all disclosure notice listing any individuals whom they could recall may have had access to secret grand jury materials but who were not listed as required. Thus, on October 20, 1982, approximately three weeks after the indictment was returned, a final notice of disclosure adding sixteen names of IRS employees was filed. K.Tr. 57–59.

The agents' post hoc attempt to determine to whom disclosure had been made in order to supplement the disclosure notices was not entirely successful. Numerous persons with access to grand jury material were forgotten and never included on the notices. The discovery of these forgotten people occurred only because, during the hearings, government representatives testified at length concerning two computer programs compiled from grand jury documents, ostensibly for purposes of assisting in the grand jury's investigation. *See, e.g.,* K.Tr. 71–79, 87–91, 157–61. The performance of this function was riddled with Rule 6(e) violations.

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[8] The government claims that all prosecutorial decisions made by IRS agents were done in consultation with the prosecuting attorneys. K.Tr. 145–46.

Although the prosecutors testified that a court order was obtained permitting the transfer of the derivative grand jury information for that purpose to Lowry Air Force Base, the government was unable to produce such an order at the hearings. K.Tr. 494–9; 517; 758; 807. The prosecutors acknowledge that no order was obtained permitting transfer of similar information to Dallas and Utah, a failure caused by their unawareness even at the hearing that the IRS agents had taken it upon themselves to arrange for the computer work to be done at those locations and because the prosecutors left the "details" of the computer work to the IRS. K.Tr. 87–88, 494–96, 523, 807.

Many IRS employees with access to information used in compiling the computer program were eventually listed on the disclosure notices. *See* K.Tr. 34, 40, 43, 61, 72, 76, 78. Just as many, however, apparently never found their way onto the lists. Although the computer programs were created by computer "groups" in Dallas and Ogden (K.Tr. 74–76), the Disclosure Notices list few, if any, of the computer personnel from Utah or Texas. The indifference of the government attorneys is further revealed by the fact that a student clerk assisting the prosecutors was not listed as having had access to grand jury material although it was revealed at these hearings that she did. K.Tr. 1085–87.

Whatever instructions there were, if any, concerning disclosure and use of the grand jury material was apparently passed on by the staff of the Internal Revenue Service itself and not by the Department of Justice attorneys. Little or no instruction concerning the strictures of Rule 6(e) is included in the training of many of those IRS employees who had access to the information. K.Tr. 155.

Further, when the IRS agents acting as "agents of the grand jury" undertook the task of explaining the secrecy provisions to other employees of the IRS, it is clear that the information was of little practical use. For example, one such agent testified that, although he informed the supervisor of the computer program that he should disclose information only to one whose name was listed on the disclosure notices, only a few of the names on those lists were revealed to the supervisor. K.Tr. 155.

### *(2) Improper Use*

The free rein given the IRS by the Department of Justice attorneys in this investigation and in the use and disclosure of grand jury material presents a serious possibility that the extraordinary powers of the grand jury were manipulated in order to obtain evidence useful in later civil litigation. The record reveals that such a danger was real and that substantial investigative activities disclosures were made for purposes other than "to assist an attorney for the government in the performance of [his] duty to enforce federal criminal law." *See* Rule 6(e)(3), Fed.R.Crim.P.

[3] IRS institutional intent to take advantage of the grand jury investigation in civil audits was confirmed by Richard Gullion, a civil IRS agent assigned to the examination division in Denver, who freely acknowledged that the IRS hoped to take advantage of the facts developed by the criminal investigation after conclusion of the criminal proceedings. W.Tr. 836–38. The government, in resisting this claim, has asserted that no improper disclosure to IRS civil agents has occurred. K.Tr. 180–81, 413–14, 416–17, 645–46. Disclosure is only one of the forbidden purposes. It is equally improper to manipulate the grand jury investigation to obtain evidence for eventual civil use by the IRS. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983). As is discussed below, the record confirms that the grand jury's extraordinary powers and resources were, in part, initiated and channeled for just such a purpose.[9]

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[9] The occasional self-serving statements by prosecutors to the grand jury that use of grand jury information in IRS audits is improper does not absolve the improper disclosures but merely serves to highlight the seriousness of the misconduct. G.J. Tr. Remarks of Prosecutor, July 8, 1981, 8:30 a.m., at pp. 12–13; November 4, 1981, 9:12 a.m., at p. 6.

The government's investigation of defendants originated at the IRS in 1979. From August, 1979 to July, 1980, the IRS conducted a joint civil and criminal investigation. In July, 1980, the IRS referred its investigation to the Tax Division of the Department of Justice with the recommendation that a grand jury investigation be conducted because its administrative processes were potentially ineffective. DX M.

The agents' testimony that they abandoned all civil interest when the grand jury commenced reminds me of Joel Chandler Harris' story about Bre'r Rabbit asking the fox not to throw him in the briar patch. At least one witness believed that the government was anxious to build civil cases through the use of grand jury information. W.Tr. 73-74. Several facts confirm that the IRS agents did not abandon entirely IRS civil interest in recouping taxes.

For example, agents of the IRS interviewed numerous tax shelter investors. The interviewees were threatened that if they did not speak voluntarily a grand jury subpoena might be obtained. Thus, they were informed that the interview was being conducted in lieu of a grand jury appearance. K.Tr. 191. In connection with these investor interviews the IRS agents assisted in the creation of "Investor Questionnaires." These questionnaires instructed interviewers to ask numerous questions concerning the tax shelters. Several of the questions involved investor motives, a subject of no conceivable relevance to a criminal investigation of the targets but highly relevant in a civil audit of the investor. DX W; G.J. Tr. Raybin, January 6, 1981 at pp. 4-7. That this interviewing program had no criminal investigation purpose is demonstrated by the fact that no investor, let alone any investors interviewed, appeared before the grand jury. None of the interviews, nor the results of the interviews, was presented to the grand jury. K. Tr. 149. The government offered no explanation at the hearings of why and for what purpose such interviews were conducted.

Civil IRS employees, armed with grand jury information, were brought into the investigation to prepare audits of the tax shelter investors. These audits, like the interviews, were not presented to the grand jury and no reasons or explanations for their preparation were offered at the hearings. K. Tr. 149.

IRS activity since the return of the indictment confirms its intent to utilize the grand jury investigation and information for civil litigation purposes. Since return of the indictment the IRS has issued civil audit letters to the investors interviewed, notifying them that their returns were being examined. The letters read in part: "[a] report will be issued in the near future containing a position consistent with *facts* as presented in the Federal Grand Jury Indictment of September 29, 1982, for the United States District Court for the District of Colorado." DX L (emphasis supplied); *see also* K. Tr. 176-78, 344-48.

Finally, several statements attributed to the prosecutors by witnesses during the course of the investigation confirm that the grand jury proceedings, at least in part, were conducted for other than legitimate federal criminal purposes. Richard Birchall, a former attorney with the Department of Justice, testified that "[t]here was a vengeance to the manner in which [the prosecutor] conducted the investigation." W.Tr. 69. Mr. Birchall also reported that on one occasion the prosecutor indicated that even if he were unsuccessful on the merits, the defense would be excessively expensive to the defendants. W. Tr. 133.

A similar improper motive was testified to by Donald Morrison a witness who made numerous grand jury appearances. With regard to a proposed business activity of some of the defendants, Morrison testified that a prosecutor indicated they were going to "shoot in [the] ass [the] coal deal." W. Tr. 192. These statements were vigorously denied by the prosecutors. I am in no position to resolve the obvious conflict in the testimony by assessing the credibility of witnesses appearing before Judge Winner with those appearing before me. Thus, I do not find as a fact that the statements were actually made. I describe them here because they illustrate the infusion of hostility and vitriol which permeates this entire case—a condition which I attribute to the frequently rude, consistently arrogant, and occasionally obnoxious conduct of some of the government attorneys assigned to the prosecution of this case.[18]

### (3) Secrecy Violations

[4] Several instances demonstrate blatant disregard for the time-honored tradition of grand jury secrecy. As discussed below, such violations were utilized by the government, not only to gain what was certainly perceived as an advantage in connection with the intended prosecution but were also apparently part of an improper attempt to embarass the targets and hinder the ongoing operation of their business during the course of the grand jury investigation.

Throughout the course of the grand jury investigation the government widely publicized the names of the individuals and entities that were being investigated as well as the nature of the grand jury's inquiry. The dissemination of information concerning the proceedings before the grand jury was undertaken without the circumspection normally afforded such disclosure by government attorneys. Such disclosures were particularly egregious insofar as the recipients of the information were known customers and business associates of the targets.

With the knowledge of Department of Justice attorneys, numerous letters were sent out identifying the targets, the related entities and the nature of the criminal investigation. The letters were sent to individuals beyond the subpoena power of the grand jury and with whom it was understood the targets had ongoing business and professional relationships. The letters, which were written on the letterhead of the United States Attorney, but signed by supposed agents of the grand jury, were not only misleading in terms of the capacity in which they were sent, but also clearly posed a danger of adversely affecting the acknowledged business and professional relationships. K. Tr. 121-25, 597-98, 969-78; DX V-1 through V-15; DX Y.

The text of the letters read in part as follows:

> The *United States Department of Justice is conducting a Grand Jury investigation of the business activities of William A. Kilpatrick, Declan J. O'Donnell, John Pettingill and Sheila C. Lerner* for the years 1977 through 1980. The Grand Jury is attempting to determine whether these individuals, through United Financial Operations, Inc., P & J Coal Company, Inc., Marlborough Investments, Ltd., International Fuel Development Corp., Ltd., and International Block Construction Company, Ltd., have committed violations of Title 18 and Title 26 of the United States Code.
>
> *The Grand Jury has obtained information which indicates that you have had and/or currently do have a business relationship with one or more of the individuals and/or entities listed above.* It has been determined that your testimony will be helpful in resolving questions which still face the Grand Jury. Subsequently, the United States Department of Justice cordially invites you to appear and testify before the Federal Grand Jury in Denver, Colorado (U.S.A.) at your convenience. Transportation, lodging and meals will be arranged for and paid by the United States Department of Justice.
>
> * * * * * *
>
> We look forward to your response,
>
> Sincerely yours,
> STEPHEN L. SNYDER
> Trial Attorney
> Criminal Section
> Tax Division
> By: PAUL E. RAYBIN
> Special Agent

(emphasis supplied)

The impropriety of publicly identifying targets in these letters was readily apparent to Judge Winner:

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[18] For examples, see sections of this opinion entitled "Facts Established by the Record," F. and G.

> [T]he identity of the persons and the transactions which were under grand jury scrutiny shouldn't be disclosed to anyone by letter or otherwise, but these startling letters did precisely that.

575 F.Supp. at 334.

The prejudicial disclosure of the targets and the nature of the grand jury's investigation, however, was not limited to these "startling letters." During the course of the investigation, the "agents of the grand jury," and other employees of the IRS, ostensibly in connection with the ongoing criminal investigation, interviewed numerous investors in the tax shelters. Those investors, too, were informed of the nature of the grand jury's inquiry and the names of those being investigated. K. Tr. 93–94.

Rule 6(e) imposes upon government attorneys the obligation to secure grand jury information from improper disclosures. That obligation was breached several times. The disclosure of secret grand jury material was not limited to identification of the targets of the investigation. Grand jury information was also shared with Richard Birchall a witness and one-time potential target.[11] Details of the investigation were revealed to Birchall during a meeting in which one of the prosecutors attempted to persuade him to assist in the government's investigation by suggesting that the grand jury had received evidence warranting his consideration as a target. W.Tr. 44–52, 983–84; 575 F.Supp. at 332–33.

Moreover, Birchall, who apparently was led to believe that he might face criminal exposure, was left unattended in a room housing grand jury material. He admittedly utilized the opportunity to rummage through the grand jury documents. 575 F.Supp. at 332–33. In further disregard of the secrecy provisions of Rule 6(e) another witness, Bernard Bailor noted that the room in which the grand jury material was housed was generally left open. W. Tr. 1130–31. Judge Winner commented that he found Mr. Bailor's testimony to be knowledgeable and candid during the hearings. 575 F.Supp. at 338–43.

Whatever may be said as to the impropriety of Richard Birchall's rummaging through grand jury testimony and documents when he was left alone in the grand jury storage room, it does not excuse the government attorneys' impropriety in availing him of that opportunity. Before leaving him alone in the grand jury storage room they accused Birchall of making several extortion threats to O'Donnell, a target of the investigation. K.Tr. 377, 381, 422–23, 425–26. Birchall obviously took advantage of the opportunity improperly provided to him to search through the grand jury records and documents.

### (4) *Improper Imposition of Secrecy Obligations*

**[5]** For what the record reveals was clearly an improper strategic purpose, secrecy obligations in clear violation of Rule 6(e)(2), Fed.R.Crim.P., were imposed upon two grand jury witnesses. On January 5, 1982, David H. Hoff and David R. Major appeared before the grand jury. When Hoff appeared separately before the grand jury he was advised:

> Q: You are also aware that the proceedings of this Grand Jury are secret and that is covered by Rule 6 of the Federal Rules of Criminal Procedure, that is, any questions I put to you today, questions that the Grand Jury may have, any discussion we have in this room at your appearance, that your appearance should be kept secret by you: do you understand that?
>
> A: Yes, sir, I do.

G.J.Tr. Hoff, January 5, 1982, 9:59 a.m., at p. 4. A similar directive was given to David R. Major. G.J.Tr. Major, January 5, 1982, 11:13 a.m., at p. 5.

These confessed violations of Rule 6(e) were neither innocent nor inadvertent. Rather, the record reveals the improper obligation to keep the information and fact of their appearances secret was imposed for a strategic purpose.

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[11] Both government attorney Snyder and agent Mendrop dispute Birchall's testimony. K.Tr. 423–34; 376–44.

Both witnesses occupied positions as attorneys who had formerly represented Defendants Kilpatrick and O'Donnell in previous SEC proceedings involving the same tax shelters under investigation before the grand jury. *See* G.J.Tr. Remarks of Prosecutor, January 5, 1982, 9:09 a.m., at p. 8. The government attorney explained to the grand jury the purpose of calling them as follows:

> The primary focus of our investigation involving the financing is the factual representations made concerning Marlborough Investments Limited, IFDC; we want to know what the lawyers were told by the principals, and what information they relayed to the parties.

G.J.Tr. Remarks of Prosecutor, January 5, 1982, 9:09 a.m., at p. 12. Thus, the government attorney imposed the unauthorized secrecy obligations upon these two witnesses to prevent defendants from determining the nature and extent of any such communication that might have been revealed and to foreclose a challenge to such testimony based upon an applicable privilege.

Such a conclusion is buttressed by the fact that the same government attorney examined four other witnesses that same day, several witnesses two days later on January 7, 1982, and approximately fifteen witnesses on other occasions. *None* of those witnesses were given the same directive. The prosecutors were fully cognizant that Rule 6(e) prohibits the imposition of secrecy obligations on grand jury witnesses.[12]

Indeed, during these hearings, the Department of Justice attorney involved acknowledged that at the time he imposed the improper obligations he was aware of the United States Attorneys' Manual provisions prohibiting the imposition of an obligation of secrecy upon a witness. Yet, although provided with ample opportunity, he was unable to offer any legitimate reason for his transgressions. K.Tr. 697–99.

### *C. Use of Pocket Immunity*

During this investigation, Department of Justice attorneys ignored entirely the federal immunity statute (18 U.S.C. §§ 6001, *et seq.*) which prescribes the congressionally authorized procedure for conferring grants of immunity and, instead, secured testimony by engaging extensively in what I have previously described as the "damnable practice" of bestowing "informal immunity" through "letters of assurance." *United States v. Anderson*, 577 F.Supp. 223, 233[13] (D.Colo.1983). The testimony of 23 witnesses in this investigation was secured by means of such "immunity" conferred by Snyder and Blondin. K.Tr. 513. Not one witness was given statutory immunity.

The profligate issuance of such "letters of assurance" had its inception shortly after the investigation commenced, in a telephone call between one of the prosecutors and Bernard Bailor, Esq., who, with his firm, represented many of the witnesses who later received such letters. K.Tr. 476. Bailor explained that his clients would not testify voluntarily before the grand jury. In response, the prosecutor suggested that in lieu of statutory immunity he would be willing to issue letters of assurance. Mr. Bailor accepted the offer and at that point a procedure for issuing the so-called informal "immunity" was inaugurated. K.Tr. 476–77.

After reaching his agreement with Bailor, the prosecutor apparently consulted with senior assistant chief Edward Vellines of the Tax Division. According to the prosecutor, Vellines indicated that the prosecutor had the authority to issue such letters of assurance provided he abided by the instructions of a Department of Justice memorandum *and* the United States Attorneys Manual *and* provided further that the recipient was not a target of the investigation. K.Tr. 514–15; 602; 623.

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[12] *See supra* note 20.

[13] As discussed later, *see supra* text accompanying note 21, I now believe I was unduly diffident in *Anderson*. The practice is not merely damnable; I believe now that it is clearly illegal.

Thereafter, the prosecutors undertook, without seeking specific approval from any superior, what was characterized as a "liberal" policy of distributing this type of informal immunity to witnesses. At no point was an effort made to obtain statutory immunity for any witness, nor was the United States Attorney's Office for the District of Colorado informed of the issuance of such letters though written on United States Attorney's stationery. K.Tr. 476–77, 720, 731–32; 575 F.Supp. 335–36; Remarks of Prosecutor, February 2, 1982 at 1:07 p.m. at p. 5–8; DX U-1–U-17.

No witness who testified pursuant to this form of informal "immunity" bestowed by the prosecutors indicated that he or she would have been less cooperative or unwilling to testify had he or she been granted statutory immunity. Rather, the government attorneys readily concede that they chose the method they did simply for the sake of expediency—to by-pass the review procedure established by Congress in the statutory scheme. K.Tr. 476, 721–22; 724–28. Among the vehicles for review avoided by the unauthorized method chosen here was the statistical compilation that Congress indicated as among its purposes for establishing the statutory procedure. Indeed, the government acknowledged that, unlike grants of statutory immunity on which central records are maintained, there is no realistic way for the Department of Justice to determine the number of letters of assurance executed. K.Tr. 729; 839. Despite what the prosecutor explains were his specific instructions, informal immunity was bestowed upon individuals once considered targets of the investigation (*i.e.*, John Jewell and Richard Bell). Moreover, one of the prosecutors admitted having conferred immunity upon an individual who it was later learned had failed to file tax returns for several years. K.Tr. [illegible]; *see also* G.J.Tr. Kitrick, May 5, 1981, [illegible] a.m., at p. 3–4; Stephenson, April 6, 1981, 3:01 p.m., at p. 3–4, 575 F.Supp. at [illegible]

In their deliberate efforts to avoid the review process and the certainty that Congress intended in the granting of witness immunity, the prosecutors injected serious ambiguity in the critical area of witness credibility. Several facts demonstrate the seriousness of the ambiguity created by this unauthorized procedure.

Despite alleged explanations of letters of assurance,[14] the grand jurors whose job it was in this investigation to assess witness credibility were presented with conflicting descriptions of the effect of these letters upon the witnesses and, consequently upon the value to place upon their testimony. On some occasions, the witnesses were advised before the grand jury that the letters gave them "immunity" and that they had no Fifth Amendment privilege. *See, e.g.*, G.J.Tr. Stanley, April 6, 1981, 4:27 p.m., at p. 8; Stephenson, April 6, 1981, 3:01 p.m., at p. 4; Kitrick, May 5, 1981, 10:36 a.m., at p. 4; Miller, June 2, 1981, 9:25 a.m., at pp. 3–4. On other occasions, witnesses were advised that although they were testifying after receiving a letter of assurance, they retained their Fifth Amendment privilege and could refuse to testify. *See, e.g.*, G.J.Tr. Jewell, February 4, 1982, 1:19 p.m., at pp. 2–3; Caddell, February 4, 1982, 10:50 a.m., at p. 3; Folsom, April 6, 1982, 11:42 a.m., at p. 4; *see also*, G.J.Tr. Remarks of Prosecutor, February 2, 1982, 1:07 p.m. at pp. 5–6.

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[14] The government's brief, Government's Response to the Bank of Nova Scotia's Proposed Findings of Fact and Conclusions of Law, filed April 9, 1984, at p. 19 provides:

> On February 2, 1982, Mr. Snyder advised the grand jury of his negotiations with Mr. Bailor [attorney for many of the witnesses], and again explained to the grand jury the difference between statutory immunity and letters of assurance. 2/2/82 (1:07 p.m.) G.J. Colloquy 5–14.

The transcript for G.J. Tr. February 2, 1982, 1:07 p.m. presents the testimony of Gordon MacManus. The substance of the testimony consists entirely of an inquiry as to whether Mr. MacManus's attorney was being paid for by Realty Inc. and whether Mr. MacManus would invoke his right against self incrimination. Contrary to the government's assertion, the transcript reflects the prosecutor's attempts to prejudice the grand jury. *See supra* text accompanying note 15.

Moreover, the prosecutors' avoidance of statutory immunity in this investigation left every witness in the posture of testifying with the impression and fear that unless the witness' testimony pleased the government, the government might withdraw its assurances. That such a fear was more real than imagined was apparent to Judge Winner in his review of the events surrounding the grand jury appearance of Richard Bell, a witness who testified with a "Letter of Assurance."

> Mr. Bell was represented by his brother, Malcolm, an attorney practicing in New York City, and a witness I found to be straight-forward, fair, convincing, and most generous to Mr. Snyder. Malcolm Bell succumbed to the carrot of pocket immunity for his brother, but, later he was told by Mr. Snyder that if Richard 'testified for Mr. Kilpatrick, all bets were off.' Maybe this meant that if Mr. Bell perjured himself he would be prosecuted for perjury, but if the immunity statute had been followed, the nagging question of the meaning of 'all bets are off' wouldn't confront us.

575 F.Supp. at 335.

The meaning of the admonition of the prosecutor was a "nagging question" to Malcolm Bell, who as an experienced attorney ultimately determined that the prosecutor must have meant that the deal was not withdrawn but that Richard Bell was subject to perjury. More significantly, however, Richard Bell, as would most lay witnesses, believed it meant the "Letter" would be withdrawn. T.Tr. 460–63.

### *D. Witness Invocation of Privilege Against Self-Incrimination*

The prosecutors pursued their course of distributing letters of assurance "quite liberally" until, in the words of one of them, it was decided "all good things come to an end." G.J.Tr. Remarks of Prosecutor, February 2, 1982, 1:07 p.m. at p. 5. At that point they replaced the unauthorized procedure with the equally abusive and dubious practice of calling witnesses who had not been issued letters and having them invoke their Fifth Amendment privilege before the grand jury regarding the targets and the transactions under investigation; knowing in advance that they would do so. K.Tr. 515.

In all, seven witnesses were called to invoke their privilege in February and March, 1982. That the purpose was to prejudice the grand jury against the targets and the tax-shelter transactions under investigation, and not to lay a statutory predicate for immunizing the witnesses (which the prosecutor never did) cannot be denied. First, the prosecutor who called the witnesses admitted that he did not do so to obtain congressionally authorized grants of immunity. K.Tr. 515. Second, the uniform questions posed to the witnesses evidence the intention to utilize the witnesses assertion to prejudice the grand jurors against the targets:

> Q: Now, Mr. Drizin, if I would ask you any questions concerning any relationship you may or may not have had with William A. Kilpatrick, John Peddingill [sic], Shiela Lerner or Declan J. O'Donnell or United Financial Operations, would you assert your right against self-incrimination on those questions?
>
> A: Yes, sir.

G.J.Tr. Drizin, March 2, 1982, 9:29 a.m., at p. 4. Third, the prosecutor did not limit his questioning merely to have the witness invoke his Fifth Amendment privilege but rather questioned several of the witnesses to elicit that Kilpatrick's company, United Financial Operations, was paying their attorneys' fees, leaving the grand jury with the impression that their refusal to testify was being financed by the targets.[15] *See e.g.,* G.J.Tr. D'Amico, February 4, 1982, 12:35 p.m., at pp. 6–7.

[6] That the prosecutor's conduct in this regard (which occurred before the second of the two grand juries empanelled in connection with this investigation) was known to him to be improper and prejudicial is revealed by his statements to the first grand jury several months earlier:

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15. *See supra* note 14.

> Immediately all the witnesses I had subpoenaed today decided that they would not want to come in here and testify and they said they would assert their Fifth Amendment rights.
>
> I could force them in here under their Fifth Amendment rights, but under the Department of Justice guidelines *I should not do that except in exceptional circumstances should I bring a person in here and have them assert their Fifth Amendment rights because it serves no purpose and it only serves to prejudice, and it can prejudice a layman.*

G.J.Tr. Remarks of Prosecutor, February 2, 1981, 9:40 a.m. at pp. 2–3 (emphasis supplied). Indeed, the prosecutor did to the second grand jury precisely what he told the first grand jury he could not and should not do. The only difference is that when he did it anyway, he did not tell the grand jurors that he was doing it to them. General instructions, months prior, that jurors not draw inferences from an individual's invocation of the privilege against self incrimination cannot correct such corruptions of the grand jury process. G.J.Tr. Remarks of Prosecutor, July 8, 1981, 10:50 a.m., at p. 6; January 5, 1982, 9:09 a.m., at pp. 22–23.

### *E. Government Summaries of the Evidence*

Although the investigation of the instant case covered almost two years, the transcripts reveal that the case against The Bank of Nova Scotia was, for the most part, presented on a single day, September 29, 1982, the day before the indictment was returned. It was done, moreover, almost exclusively by having Mendrop summarize the "evidence" against the bank. The government seeks to explain these summaries as nothing more than legitimate use of hearsay testimony by the grand jury. *See United States v. Rogers,* 652 F.2d 972, 975 (1981).

During the course of the September 29, 1982 proceedings, the grand jurors expressed concern that The Bank of Nova Scotia was being singled out for prosecution while other banks that allegedly permitted similar banking activity were not being named as defendants. In response, the prosecutor suggested that the Bank of Nova Scotia was a more appropriate target because, unlike the other institutions involved, it was a large internationally known bank doing business in the United States and its prosecution could be expected to deter others. *See* G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at p. [illegible]–32. The prosecutor erroneously suggested that the "evidence" indicated that The Bank of Nova Scotia representatives were familiar with the operation of Kilpatrick's business and that the IRS was to be defrauded by virtue of the banking activity. *See* G.J.Tr. Remarks of Prosecutor, September 29, 1982, 8:52 a.m. at pp. 8, 13.

No evidence of the kind suggested by the prosecutor had been presented to the grand jury. The discussion of these points was heard for the first time during the testimony of Mendrop. Instead of being presented as a witness who was to present hearsay investigative information concerning the Bank's role, Mendrop was introduced to the grand jurors as one who was to "summarize" and "just walk through, one more time, and refresh your memory." G.J.Tr. Remarks of Prosecutor, September 29, 1982, 8:52 a.m. at p. 8. Mendrop then proceeded to "summarize the evidence relating to each of the individuals involved" and "the evidence pertaining to The Bank of Nova Scotia." *See* G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at pp. 40, 52, 64, 66, 72. On the vital issue of the bank's knowledge and intent, however, it is clear that Mendrop's testimony was both misleading and inaccurate. In particular, Mendrop purported to "summarize" in connection with the bank's role the testimony presented by three witnesses: Messrs. Waters, Ros and Charles. An examination of the grand jury testimony, however, reveals that it was not a summary of the evidence before the grand jury. One of the witnesses whose testimony was "summarized" never appeared before either grand jury. The other two witnesses whose testimony was "summarized" did not give testimony even remotely resembling that supposedly "summarized" by Mendrop. The grand jury was never informed of these mischaracterizations or of any alternative basis for Mendrop's summary.

The inaccurate "summaries" of the evidence before the grand jury concerning the role of The Bank of Nova Scotia was particularly abusive for several reasons:

(i) The misleading "summaries were presented by an individual upon whom the grand jurors had been urged to rely as their "agent."

(ii) The investigation spanned 20 months and two successive grand juries. Much of the testimony of the 27 witnesses who appeared before the first jury was read to the second grand jury in an improper and unsupervised manner.

(iii) The grand jurors had not previously focused on The Bank of Nova Scotia as a get since the bank was not mentioned as rget until the month the indictment was urned:

(iv) The reading of testimony from the first grand jury (which included the testimony of Ros and Charles) occurred early in the presentation of the case to the second grand jury. The grand jurors and the prosecutors frequently commented upon the monotony and difficulty of listening to the readings and, indeed, the grand jurors expressed confusion as to which transcripts had been read. *See, e.g.,* G.J.Tr. Remarks of Prosecutor, November 4, 1981, 9:12 a.m. at p. 5; Remarks of Prosecutor, February 2, 1982, 1:07 p.m. at p. 20; and

(v) The improper summaries related to vital issues concerning the Bank's knowledge and intent. Unbeknown to the grand jurors, the government attorneys contemporaneously entertained serious doubts as to the accuracy of certain critical "facts" contained in the summaries.

In sum, the mischaracterizations reasonably could not have been expected to be picked up by the grand jurors and, undoubtedly, formed a substantial basis for the indictment against the bank. The examples of improper mischaracterizations of the evidence are detailed below.

### *(1) Mr. Waters*

Asserting that he was discussing a "few of the pieces of evidence" and "the summary of the evidence pertaining to The Bank of Nova Scotia," Mendrop purported to summarize what the prosecutor characterized as the "evidence" provided by Waters about a trip supposedly made by defendant Monte Smith, the bank's Cayman Island branch manager, to Kilpatrick's offices in Denver. (Smith was vital as it is upon his activities that the bank has been claimed vicariously liable.) G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at pp. 36, 64, 65–72; *see also* G.J.Tr. Remarks of Prosecutor, September 29, 1982, 9:07 a.m., at p. 10. According to Mendrop and the prosecutor, this claimed trip by Monte Smith was important because it demonstrated that Smith was familiar with Kilpatrick's tax shelter operations. Apparently unbeknown to the grand jurors, Waters never testified before either of the grand juries. The grand juries were never informed of the actual source of Mendrop's testimony which apparently was an interview of Waters or testimony of Waters at a contempt hearing involving Kilpatrick.

Whatever the source, it is clear that Mendrop's supposed "summary" of Waters' testimony is an inaccurate recitation of "facts" in several significant respects. At the time Mendrop was supposedly summarizing the "facts" of Monte Smith's trip to Denver, the government attorneys entertained serious doubts about its accuracy because Waters' description of the individual he met at Mr. Kilpatrick's offices did not resemble Monte Smith.[16] The testimony of Waters during the 1983 obstruction trial of Mr. Kilpatrick confirms the inaccuracies of Mendrop's testimony. During that trial Waters testified that when picking up some checks from Kilpatrick for payment due him, he was informed by Kilpatrick that one of the people present was Mr. Smith who was the manager of the Bank branch on which the checks were drawn. Mr. Waters' description of that individual during trial does *not* resemble Monte Smith. T.Tr. 311–12. In fact, at these hearings, commenting on Mr. Water's somewhat unusual description of Monte Smith, one of the prosecutors admitted that at the time "[t]here was a real question as to whether or not it was the same person." K.Tr. 742–43. Despite the facts that Waters was not called as a witness before either grand jury, that the grand jurors were never informed that transcripts of taped interviews of Waters existed and that a "real question" existed as to the accuracy of Waters' identification, Mendrop was permitted to represent to the contrary that there was "considerable confirmation that Mr. Smith did actually come out here and visit with Mr. Kilpatrick." G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at pp. 66–68.

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[16] The government claims that the doubts about the accuracy of Water's description did not arise until after Mendrop testified. Nevertheless, even under the government's version, such doubts existed months before the indictment. K.Tr. 1067–68.

*(2) Mr. Ros*

Raul Ros, a "chauffeur" for Mr. Kilpatrick, testified before the first grand jury. He did not appear before the grand jury that returned the indictment; his testimony was read to the second grand jury. G.J.Tr. Mendrop, September 9, 1981, 8:44 a.m., at p. 3. A year after Mendrop read his testimony to the grand jurors, Mendrop purported to summarize it. According to Mendrop, Ros' evidence confirms the testimony of Waters with regard to Monte Smith's appearance in Denver. G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at p. 66. Mendrop indicated that Ros commented that during Smith's claimed visit to Denver, he and Kilpatrick discussed funding for the tax shelters. No such testimony can be found in Raul Ros' grand jury transcript. Mendrop gave absolutely no explanation of an alternative source, but rather erroneously led the grand jurors to believe that he was simply relaying information contained in the Ros testimony before the prior grand jury.

*(3) Mr. Charles*

Mendrop's "summary" also mischaracterizes the testimony of Barry Charles. Like Raul Ros, Charles testified before the first grand jury not the second grand jury. As he did with Raul Ros' testimony, Mendrop attributed "testimony" to Charles that the bank fulfilled virtually all of Mr. Kilpatrick's requests and that it "appeared" to Charles that the bank officers knew what was being done. G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at p. 68. The "summary" given by Mendrop is at odds with Charles' testimony. G.J.Tr. Charles, June 2, 1981, 8:40 a.m. Again, Mendrop did not identify any alternate source for the comments attributed to Charles.

In his testimony before the first grand jury Charles indicated that he was not present during most of the transactions in the bank. Charles, who traveled to the Cayman Islands with Kilpatrick, Pettingill and O'Donnell, was the least involved in the group and observed less than Oliver Hemphill who himself testified that he had witnessed little of the banking activity. *See* G.J.Tr. Hemphill, May 3, 1981, 9:25 a.m., at p. 12. Thus, Mendrop's suggestion to the grand jurors of the "evidence" to be gleaned from Charles "testimony" is contradicted by the actual testimony of Charles and others.

*(4) Comments by the Prosecutor*

In addition to presenting Mendrop's summary of the "important evidence" against the bank on the day before the indictment, the prosecutors also argued in favor of an indictment of the bank. Once again, the evidence against the bank on the essential issue of knowledge of the claimed object of the conspiracy was seriously mischaracterized by the prosecutor, who asserted:

> [A]s my agents will tell you there is evidence that the Bank knew it was the IRS—*they were in fact told that it was the IRS they were defrauding.*

G.J.Tr. Remarks of Prosecutor, September 29, 1982, 8:52 a.m. at p. 13 (emphasis supplied). No such evidence was ever presented. Indeed, even the misleading summary of Mendrop provides no basis for such a statement.

### *F. Interrogation in Absence of Counsel*

In February, 1983, during the period between indictment and dismissal of the charges against The Bank of Nova Scotia, one of the prosecutors departed from the traditional role of a government trial attorney in order to travel to Puerto Rico and engage in investigative activity. The prosecutor undertook his journey with the intention of interviewing bank employees concerning the whereabouts and reasons for transfer of another bank employee, Malcolm Haynes, who the prosecutor understood was the second in command at the bank's Cayman Island branch during the period covered by the indictment. No attempt had been made to talk to this potential witness before indictment. The prosecutor's purpose was to interview him concerning matters underlying the indictment. W.Tr. 642–49; 694; 709–10.

lthough the prosecutor was fully aware . the bank, an indicted defendant, was presented by counsel, he did not feel constrained by the Supreme Court's dictates in *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) to inform counsel of his intentions to interview high ranking bank employees.[17] Instead, he undertook this investigative exercise with the "hope" of eventually interviewing Malcolm Haynes "in the absence of Mr. Morvillo,"[18] firm in the belief that, if he committed a constitutional violation of the type identified in *Massiah,* the only likely sanction was the suppression of evidence in the government's case-in-chief. In the prosecutor's words, "no indictment has ever been dismissed because of [a *Massiah* violation]." K.Tr. 1114, 1122; W.Tr. 643, 693–94, 709–10.

The prosecutor also testified that he believed it was permissible to interview high ranking employees of an indicted corporate defendant because it was authorized in *Upjohn Co. v. United States,* 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) and because, unlike *Massiah* he was not engaged in acts of "subterfuge."[19] W.Tr. 643, 693–94, 709–10; K.Tr. 1114–15.

When he arrived in Puerto Rico, the prosecutor and another investigator, Victor Torrez Perez, an IRS special agent, appeared without prior arrangement at the branch offices of The Bank of Nova Scotia and proceeded to interrogate several of its representatives. Among others, they questioned Malcolm Haynes' former secretary and his replacement, the branch's controller. They also interrogated other high ranking representatives of the bank—including Douglas Rector, the Puerto Rico area manager of The Bank of Nova Scotia and chief executive officer of the Bank's Puerto Rico subsidiary. W.Tr. 640–42, 698–99.

After leaving the bank, accompanied by Special Agent Torrez Perez, he searched out the school attended by Haynes' two small daughters, ages eight and ten, in order to determine the whereabouts of their parents. At the end of the school day, the prosecutor (who had already elicited information from the school's principal and the girls' teachers) followed the children on foot "by about a hundred yards." His purpose was to have the girls lead him to their mother. W.Tr. 642–46; 699–708.

The prosecutor's visit to Puerto Rico, however, did not end his endeavor to interrogate high ranking representatives of the defendant bank without notice to or leave of defense counsel. Shortly after his interrogation of Mrs. Haynes, he wrote a letter to her requesting that she use her efforts to have her husband speak with the government. Like his previous efforts this approach was made without informing defense counsel. Indeed, the prosecutor asserted that he "would have interviewed Mr. Haynes in the absence of Mr. Morvillo hopefully." W.Tr. 709–10.

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[17] The government argues that interviewing Haynes does not give rise to *Massiah* violations because he was only "a potential witness who had information as to the bank's conduct concerning the events charged in the indictment." Government's Response to The Bank of Nova Scotia's Proposed Findings of Fact and Conclusions of Law, filed April 9, 1984, at p. 37. The government ignores *Massiah* because Haynes was not individually named as a defendant in the indictment. *Id.* Nevertheless, the government does recognize that Haynes "was the number two man in the Cayman Island branch of The Bank of Nova Scotia at the time of the events in question." *Id.* quoting W.Tr. 653.

[18] Mr. Morvillo is the bank's lead defense counsel.

[19] *See supra* note 23.

### G. *Mistreatment of Witnesses*

Professor Roland Hjorth, a tax law professor who Judge Winner observed "is a recognized expert who was employed by defense counsel" was permitted to testify before the grand jury that returned the indictment. His treatment by the prosecutor on the occasion of his appearance contrasts markedly with the treatment the prosecution afforded its own expert, Roger Schneider, who was passed off as an "agent of the grand jury."

As Judge Winner observed:

> [Professor Hjorth's] views of tax law differed markedly from those of [the prosecutor], who bragged on frequent occasions that he had never taken a course in taxation and knew almost nothing about it. Nevertheless, Professor Hjorth was browbeaten and ridiculed by [the prosecutor], and some of the conversation so out of place for an ethical prosecutor took place during a recess in the hearing of some grand jurors.

575 F.Supp. at 333.

Indeed, the prosecutor's heated argument with Professor Hjorth was also overheard by witnesses scheduled to appear before the grand jury. W.Tr. 334. Moreover, the conduct was so shocking that Richard Slivka, a local attorney formerly employed by the Department of Justice and Colorado United States Attorney's Office, who was representing witnesses scheduled to appear and who himself observed the conduct, wrote a letter to Chief Judge Finesilver shortly thereafter reporting the incident. W.Tr. 317–27; 350–64. Professor Hjorth testified that the prosecutor's conduct was so abusive that he would never again appear as an expert witness in a similar proceeding.

Judge Winner concluded of the prosecutor's conduct that:

> Intimidating witnesses by telling them that their testimony disgraces them and implying that the Tax Division of the Department of Justice will take after the witness and will complain to the University of Washington Law School because an expert testified to his expert opinions does no credit to our government . . . [s]eemingly, the professor's testimony isn't seriously contested. I hope that we haven't gotten to the point that disagreement with the legal concepts of the IRS provides grounds for attacks by that bureaucracy because sometimes the IRS is wrong. *U.S. v. Sells Engineering*, 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 and *U.S. v. Baggot*, 463 U.S. 476, 103 S.Ct. 3164, 77 L.Ed.2d 785.

575 F.Supp. at 333; *see also* K.Tr. 502–05.

## CONCLUSIONS OF LAW

The government's position in this case is reminiscent of the common law defense of confession and avoidance in which, for the most part, the truth of the averments of fact are admitted, but argument is made which tends to deprive the facts of their ordinary legal effect or obviates them. Thus, it is said:

> Just as there has never been a perfect lawyer, a perfect judge, or perfect trial, so has there never been a perfect investigation. Contrary to what one might expect, in view of the defense allegations, the transcripts of the grand jury proceedings do not reveal any conduct whatsoever by the prosecutors seeking to overreach or override the independence of the grand jury.

Government Memorandum, Government Response to The Bank of Nova Scotia's proposed Findings of Fact and Conclusions of Law, filed April 9, 1984, at pp. 3–4. The government's response to the defendants' several proposed findings of facts is mainly a recitation of the number of instances in which its prosecutors did not violate the law.

As I view the present state of the law as it applies to this case, there are four analytical modalities which must be considered. In the first, specific violations of specific rules require dismissal. I view this form of analysis as essentially quantitative. There either is a violation or there isn't and the conclusion is ineluctable depending on the factual premise which is established. The second modality, requires an evaluation of the totality of circumstances extant so that a qualitative assessment may be made. Finally, cases distinguish the third modality, the authority and duty of district courts to supervise the conduct of prosecutions and grand juries, from the fourth modality, the duty to enforce the mandates of the Constitution.

In articulating the conclusions of law I have reached in this case, I shall consider all four modalities in the order in which I have just expressed them. I shall begin with Rule 6, Fed.R.Crim.P.

### A. Violations of Rule 6(d)

] As noted by Judge Winner, Rule 6, R.Crim.P. does not authorize grand juries to have agents. The creation of that role and its misleading description to the grand jury is an improper intrusion into the exclusive and independent province of the grand jury by government attorneys and investigators. The most important function of the grand jury is to stand between the government agents and the suspect as an unbiased evaluator of the evidence. *United States v. Dionisio*, 410 U.S. 1, 16-17, 93 S.Ct. 764, 772-773, 35 L.Ed.2d 67 (1973). "The purpose of the grand jury requires that it remain free, within constitutional and statutory limits, to operate 'independently of either prosecuting attorney or judge.'" *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 103 S.Ct. 3133, 3141, 77 L.Ed.2d 743 (1983).

[8] Rule 6(d), Fed.R.Crim.P., delimits those who may be present in grand jury proceedings by the following explicit language:

> (d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

After his usual thorough analysis of the relevant case law and with characteristic pungency, Judge Matsch, of our Court, stated in *United States v. Pignatiello*:

> A review of all of these cases reinforces the conclusion that the only effective sanction for a violation of Rule 6(d) is dismissal without any further inquiry into the effects of that violation.

582 F.Supp. 251, 254 (D.Colo.1984).

I conclude that events which occurred in the grand jury room while *soi-disant* agents of the grand jury were present and not under oath as witnesses under examination violated Rule 6(d) and therefore require dismissal of the indictment. As Judge Matsch carefully notes in *Pignatiello*, brief intrusions on the proceedings during which no testimony is taken nor questions asked nor statements made about the case by grand jurors such as the delivering of a note to the prosecutor by his secretary or the repair of a switch by a maintenance man are not included within the *per se* rule. In this case, there is no doubt that matters of considerable substance occurred while Rule 6(d) was being violated.

### B. Violations of Rule 6(e)

[9] Courts have held that violations of the strictures of Rule 6(e), Fed.R.Crim.P., typically require the sanction of contempt rather than dismissal. *United States v. Hoffa*, 349 F.2d 20, 43 (6th Cir.1965). However, where Rule 6(e) is violated recklessly and systematically, dismissal is appropriate. *United States v. Gold*, 470 F.Supp. 1336, 1352-56 (N.D.Ill.1979). Where knowing violations of Rule 6(e) prejudice and embarrass targets whose identities the government reveals, the government itself has recognized that the contempt remedy is "*not always* ... wholly adequate." United States Attorneys' Manual § 9-11.370 (emphasis supplied).

### (1) *Rule 6(e)(3)—Improper Disclosure and Use*

[10] Rule 6(e)(3) provides in relevant part:

> (3) Exceptions.
>
> (A) *Disclosure otherwise prohibited* by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand jury, *may be made to—*
>
> (i) an attorney for the government for use in the performance of such attorney's duty; and
>
> (ii) *such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.*
>
> (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. *An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.*

(emphasis supplied).

The prosecutors in this case permitted several violations of this rule. They relinquished to the IRS their responsibility to determine the persons to whom disclosure would be made. The IRS agents then failed to provide the "prompt" notification of such disclosure mandated by the rule. Moreover, the IRS representatives, in direct contravention of recent Supreme Court dictates, improperly manipulated the secret material and their novel roles as "agents of the grand jury" to obtain information and data for use during civil litigation that they knew would follow on the heels of the criminal case. *See United States v. Sells Engineering, Inc., supra, United States v. Baggot*, 463 U.S. 476, 103 S.Ct. 3164, 77 L.Ed.2d 785 (1983).

Rule 6(e)(3) provides that disclosure can be made to "such government personnel as are deemed necessary by an attorney for the government ..." provided the "attorney for the government ... promptly provide[s] the district court ..." with notice of such disclosure. The instant record reveals not only that IRS representatives regularly took it upon themselves to determine to whom disclosure should be made, but also that in some cases the "attorneys for the government" were not notified of such disclosure until after it had occurred, if they were notified at all. Moreover, notices to the district court were not filed promptly but were prepared in some instances substantially after such disclosure, even after the investigation had concluded and the indictment was filed.

With regard to the delegation of the Rule 6(e)(3) responsibilities in this investigation by Department of Justice attorneys, Judge Winner noted:

> I am troubled about testimony suggesting that authority to make the disclosure decisions was delegated to the IRS Special Agent/Grand Jury Agents Prosecutor's helpers. Under common law rules of agency, this authority couldn't be delegated to a subagent, and especially it couldn't be delegated to an IRS agent whose fellow workers were aiming at the defendants from a different angle. My worry on this score is not lessened by an IRS letter in evidence saying that making a civil tax case under the administrative process would be difficult. *United States v. Sells Engineering* and *United States v. Baggot*, both *supra*, which settle the question of using a grand jury to collect taxes.

575 F.Supp. at 338 (1983).

The broad delegation to the IRS of control over the course of the grand jury investigation is amply supported by the record. The extensive disclosure of grand jury material to IRS civil employees, the haphazard and *post hoc* method of identifying those to whom disclosure was made and the omission from the disclosure notices of numerous IRS employees privy to grand jury information clearly contravene the rule. It is fanciful to suggest that these IRS and civil employees will erase from their minds that material obtained as part of the grand jury's investigation.

In *United States v. Sells Engineering, Inc., supra,* the Supreme Court recognized that it is difficult or impossible to demonstrate the extent of improper disclosure and use of grand jury material made during the course of an investigation. *Id.* 103 S.Ct. at 3142. In the instant case a significant portion of the direction of the investigation was unrelated to the federal criminal goals. As the Supreme Court observed:

> [B]ecause the Government takes an active part in the activities of the grand jury, disclosure to government attorneys for civil use poses a significant threat to the integrity of the grand jury itself. If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit....

*Id.*

In *Sells* the Supreme Court analyzed the grand jury process and the provisions of Rule 6(e) in deciding whether civil division lawyers in the Department of Justice should have automatic access to grand jury materials to assist them in civil litigation. The court denied such access for three reasons: (1) civil disclosure threatens to subvert the limitations otherwise imposed on the government's powers in civil and administrative discovery and investigation; (2) civil disclosure may tempt prosecutors to manipulate the grand jury investigation to obtain evidence useful in civil litigations; and (3) civil disclosure increases the number of persons privy to grand jury matters thereby increasing the risk of inadvertent or illegal disclosure to others. *Id.* at 3142, 43. The IRS's participation in the grand jury investigation in this case achieved each of these illicit purposes.

As noted by Judge Winner, the genesis of the grand jury's inquiry was a belief by the IRS that it could not effectively investigate the facts underlying the subject tax shelters pursuant to its congressionally circumscribed administrative enforcement powers. Thus, the extraordinary powers of the grand jury were sought and usurped.

(2) *Rule 6(e)(2)—Secrecy Violations*

Rule 6(e)(2), Fed.R.Crim.P. provides:

> (2) General Rule Of Secrecy.—A Grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

Rule 6(e)(2) is a codification of the traditional requirement that matters occurring before the grand jury should be treated as confidential. Courts have consistently recognized that this traditional requirement exists to no small degree in order to protect the name and reputation of the targets during the pendency of the period the allegations are being investigated. *See e.g. United States v. Malatesta,* 583 F.2d 748, 752 (5th Cir.1978), *cert. denied,* 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59 (1979). Thus, courts have held that Rule 6(e) prohibits the government from publicly identifying the targets of a grand jury's inquiry. *See In re Bart,* 304 F.2d 631, 637 n. 19 (D.C.Cir.1962); *Hawthorne v. Director of Internal Revenue,* 406 F.Supp. 1098, 1128–29 (E.D.Pa.1975).

During the course of this investigation the government repeatedly and systematically disclosed the identity of the targets to individuals and entities that the government acknowledged had a "business relationship" with the targets and to investors identified as customers of the targets.

These numerous disclosures adversely affected the business activities of the targets at a time when the grand jury was charged with investigating whether any crimes may have been committed. The abuse of power is evident.

The violations of Rule 6(e)(2) do not end with the improper violations of the secrecy requirements. In order to gain a tactical advantage, prosecutors selected two witnesses and directed them not to disclose the fact or substance of their testimony. As Judge Winner held, this was done in direct contravention of Rule 6(e)(2):

> [The imposition upon witnesses of secrecy obligations] is now verboten because of the language of the rule saying, 'No obligation of secrecy may be imposed on any person except in accordance with this rule.' This language has been uniformly interpreted to prohibit any instruction to a witness that his testimony is secret. *In re Langswager,* (1975) D.C. Ill. 392 F.Supp. 783; *In re Grand Jury Witness Subpoenas* (1974) D.C.Fla. 370 F.Supp. 1282; *In re Alvarez* (1972) D.C. Cal. 351 F.Supp. 1089; *In re Minkoff* (1972) D.C.R.I. 349 F.Supp. 154; *In re Investigation before April 1975 Grand Jury* (1976) D.C.Cir. 531 F.2d 600; *In re Vescovo Special Grand Jury* (1979) 473 F.Supp. 1335, and many other cases. In spite of this express command of Rule 6(e), secrecy obligations were imposed on several witnesses, and, to make the violation more disturbing, secrecy obligations were imposed on lawyers called to furnish information concerning their clients. That makes the violation gravely beyond the pale, because of the impossible position the lawyer-witness is placed in, but that's what the grand jury transcript discloses. No 'oath' of secrecy was administered, but an obligation of secrecy was imposed by instructions from government counsel to witnesses. This foolishness may or may not have been intentional, but ignorance of the law is not a defense available to a prosecutor. *This misconduct is established by the record, and it will prove difficult for the government to deny,* just as the government had to admit the attempted administration of an 'oath' by Mr. Snyder. The government suprisingly defends the proven mishmash of functions of the IRS Special Agent Grand Jury Agents Assistants to the Attorney for the Government appointed under Rule 6(e), but maybe it thinks that admitting that this was error would confess the motion to dismiss.

573 F.Supp. at 331, 332 (1983); *see also United States v. Radetsky,* 535 F.2d 556, 569 (10th Cir.), *cert. denied,* 429 U.S. 820, 97 S.Ct. 68, 50 L.Ed.2d 81 (1976); *Application of Eisenberg,* 654 F.2d 1107, 1113 n. 9 (5th Cir.1981); *In re Russo,* 53 F.R.D. 564, 570 (C.D.Cal.1971); *In Re Disclosure of Evidence,* 184 F.Supp. 38, 41 (E.D.Va.1960); *Arlington Glass Co. v. Pittsburgh Plate Glass Co.,* 24 F.R.D. 50, 52 (N.D.Ill.1959).

As Judge Winner suggests, the only issue that could not be determined by the record before him was whether the secrecy obligations were imposed intentionally. The prosecutor's testimony during the hearings before me, however, leaves no doubt that the improper obligation was imposed deliberately, with full knowledge of the witness's relationship to the targets and in violation of the commands of the United States Attorneys' Manual.[29] Moreover, no legitimate explanation for the activity was ever presented.

The numerous violations of Rule 6(e) by the Department of Justice attorneys ignore the rights of unindicted subjects of an investigation and the secrecy and independence of the grand jury itself. As I shall discuss later, a court's supervisory power to dismiss an indictment is appropriately utilized to ensure that governmental impropriety of a similar nature is not repeated in future investigations or prosecutions. *United States v. Owen*, 580 F.2d 365, 367 (9th Cir.1978); *United States v. Houghton*, 554 F.2d 1219, 1224 (1st Cir.), *cert. denied*, 434 U.S. 851, 98 S.Ct. 164, 54 L.Ed.2d 120 (1977). Dismissal is particularly appropriate in order to hold all government prosecutors acting within this district to the same high standard of conduct that the United States Attorney demands of his own assistants. *United States v. Jacobs*, 547 F.2d 772, 778 (2d Cir.1976) (Organized Crime Strike Force attorney operating in the Eastern District of New York); *United States v. Gold*, 470 F.Supp. 1336 (N.D.Ill. 1979) (Environmental Protection Agency Staff attorney appointed as Special Attor- in the Department of Justice); *see also ted States v. Estepa*, 471 F.2d 1132, 7 (2d Cir.1972).

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[29] The United States Attorneys' Manual provides at § 9-11.362:

> Rule 6(e) specifically prohibits any obligation of secrecy from being imposed 'upon any person except in accordance with this rule.' Witnesses, therefore, cannot be put under any obligation of secrecy. *Application of Eisenberg,* 654 F.2d 1107, 1113 n. 9 (5th Cir.1981). This, however, should not prevent the grand jury foreman from requesting a witness not to make unnecessary disclosures when those disclosures or the attendant publicity might hinder an investigation.

As previously indicated, however, I hold that where violations of Rule 6(e) are intentional or reckless and systemic, the sanction of contempt is insufficient and dismissal of the indictment is warranted. Under such circumstances, it is not necessary for the defendant to show that he has been prejudiced by the violations. In the instant case, however, such showing of prejudice has been convincingly made.

### *C. Violations of Witness Immunity Statutes*

Earlier in this opinion,[21] I indicated that I believe I was unduly diffident in describing so-called pocket immunity or "Letters of Assurance" as a "damnable practice." I believe I was wrong because I did not then have the benefit of the Supreme Court's opinion in *United States v. Doe*, — U.S. —, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984).

In *Anderson v. United States, supra*, I wrote:

> The government, in this case, made extensive use of informal or 'pocket' immunity. This is putative immunity granted to a witness by letter or oral representation of the prosecutor rather than ordered by a judge after satisfaction of the procedures of 18 U.S.C. §§ 6002 and 6003. Such immunity poses serious problems since it circumvents the statute and leaves an inadequate record of the scope of the immunity granted. *See, United States v. Quatermain, Drax*, 613 F.2d 38 (3rd Cir.1980). The procedures established by Congress in 18 U.S.C. §§ 6002 and 6003 clearly indicate an intent to formalize, standardize and limit the use of immunity. The statute requires approval of a senior Justice Department official as well as application to and order of a United States District Court Judge before immunity is conferred. The procedure leaves no doubt as to the accomplishment of the grant, the particularized need of the witness and the scope of the immunization. It also leaves for Congress and the public a complete and definite record of the frequency, efficacy and reasons for the use of immunity. Informal immunity, apparently in widespread use by the Justice Department, accomplishes none of those goals. It is a damnable practice. No notice need be given to senior Justice Department officials or to a judge. The only record, if any, is a letter by the U.S. Attorney or a transcript of an oral representation, if it was made on the record. Such informality has resulted in confusion over witnesses rights in the past, *Quartermain, Drax, supra*, 613 F.2d 38, and lends itself to excessive use of unchecked discretion. While the immunity grant is always a matter of prosecutorial discretion, the procedures of §§ 6002 and 6003 subject it to the light of public, congressional and judicial scrutiny and insure that it is not invoked or revoked arbitrarily or capriciously.

In *United States v. Doe*, Justice Powell wrote:

> As we stated in *Pillsbury Co. v. Conboy*, 459 U.S. 248, 74 L.Ed.2d 430, 103 S.Ct. 608 (1983), in passing the use immunity statute, 'Congress gave certain officials in the Department of Justice exclusive authority to grant immunities.' *Id.*, at

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[21] *See supra* note 13.

253, 74 L.Ed.2d 430, 103 S.Ct. 608 [at 612]. 'Congress foresaw the courts as playing only a minor role in the immunizing process: ...' *Id.*, at 254, n. 11, 74 L.Ed.2d 430, 103 S.Ct. 608 [at 613]. The decision to seek use immunity necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation. *See United States v. Mandujano*, 425 U.S. 564, 575, 48 L.Ed.2d 212, 96 S.Ct. 1768 [1776] (1976) (plurality opinion). Congress expressly left this decision exclusively to the Justice Department. If, on remand, the appropriate official concludes that it is desirable to compel respondent to produce his business records, the statutory procedure for requesting use immunity will be available.,

— U.S. at —, 104 S.Ct. at 1244–45, 79 L.Ed.2d at 562–63.

**[11]** It thus can be seen most clearly that Congress has vested exclusive authority to grant immunities in a few specified officials in the Department of Justice. Further, Congress has clearly and unequivocably set forth the parameters within which that discretion must be exercised. Ordinary statutory construction employing the principle of *expressio unius est exclusio alterius* and buttressed by the quoted language of Justice Powell leads to only one conclusion: Pocket immunity is illegal: when granting immunity, the Department of Justice must comply with the requirements of 18 U.S.C. §§ 6002 and 6003.

**[12]** I hold that the repeated use of letters of assurance or so called "pocket immunity" in the instant case violated the applicable statutes and tainted the grand jury indictment with its illegality.[22]

### *D. Violations of the Fifth Amendment*

**[13]** Courts have consistently held that it is improper to call a witness solely for purposes of having that witness assert their rights under the Fifth Amendment when the prosecutor is aware of the witnesses' intention to do so. *See Namet v. United States*, 373 U.S. 179, 186, 83 S.Ct. 1151, 1154, 10 L.Ed.2d 278 (1963); *United States v. Ritz*, 548 F.2d 510, 521 (5th Cir. 1977); *United States v. Maloney*, 262 F.2d 535, 537–38 (2d Cir.1959). The facts here demonstrated that the prosecutor hoped to take advantage of impermissible inferences that arise from invocation of the privilege. *See United States v. Maloney*, 262 F.2d 535 (2d Cir.1959). The prosecutor's ploy "served no other purpose than calculated prejudice." *United States v. Samango*, 607 F.2d 877, 883 (9th Cir.1979).

**[14]** Moreover, the improper efforts to prejudice the defendants by impermissible inferences flowing from the seven witnesses' assertions of their privilege against self-incrimination was compounded by the questioning concerning the payment of the witnesses' legal fees. No legitimate purpose for such questioning exists. Indeed, similar questioning before a grand jury has been held to be improper. *United States v. Gold*, 470 F.Supp. 1336, 1352 (N.D.Ill.1979).

Dismissal of an indictment is not required *per se* by the deliberate contriving of a prosecutor to have witnesses invoke their Fifth Amendment privilege. Such conduct is, however, a factor to be considered in the totality of circumstances in determining whether a grand jury has been overreached or usurped.

### *E. Presentation of Misinformation*

**[15]** The mischaracterization of the testimony before the grand jury and the unidentified use of questionable hearsay information with regard to vital issues intrudes upon the independent role of the grand jury. *See United States v. Samango*, 607 F.2d 877 (9th Cir.1979). The court in *Samango* emphasized that such behavior, even if unintentional, causes "improper influence and usurpation of the grand jury's role." *United States v. Samango*, 607 F.2d at 882. Such a danger is particularly present where, as here, the misrepresentations could not be expected to be readily apparent to the second grand jury and related to material issues in the prosecution. *See id.* at 883; *United States v. Lawson*, 502 F.Supp. 158 (D.Md.1980) (indictment dismissed where prosecutor's examination of witness created a false impression and misled grand jurors as to nature of the evidence); *United States v. Gallo*, 394 F.Supp. 310 (D.Conn.1975) (indictment dismissed where grand jurors misled as to hearsay nature of testimony and misstatements).

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[22] The conventional remedy for illegal use of "pocket immunity" would, in most instances, take the form of a *post facto* grant of statutory immunity or the equitable enforcement of the pocket agreement, for the benefit of grand jury witnesses who relied on the prosecutor's promises. These concerns are not before me here. Still, the use of pocket immunity was so pervasive in this case that it reflects upon the general conduct of the prosecutors and the grand jury.

### F. *Violations of the Sixth Amendment*

[16] It is beyond cavil that, upon indictment, a defendant becomes an "accused" with a right to counsel guaranteed by the Sixth Amendment. *See Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). The guarantees of the Sixth Amendment apply to corporate defendants with the same force as to individual defendants. *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (3d Cir.1979); *see also Grandbouche v. Adams*, 529 F.Supp. 545, 547 (D.Colo.1982). In order to give meaning to these guarantees, the Supreme Court has held that once a defendant becomes an accused, it is improper for a government official to question that defendant out of the presence of counsel. *Brewer v. Williams, supra; Massiah v. United States, supra.*

[17] In the instant case, the Department of Justice engaged in precisely the type of interrogation proscribed by the Supreme Court.[23] Without notifying counsel for the indicted bank, the prosecutor along with a federal agent, impermissibly interrogated several high level bank employees in hopes of obtaining incriminating information. In several respects the instant conduct is even more egregious than that which occurred in *Brewer* and *Massiah*. The prosecutor's actions here were premeditated and prompted by the expectation that the worst that would become of his constitutional violations would be a limited suppression of evidence.[24]

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[23] The prosecutor's *post hoc* rationalizations attempting to demonstrate the propriety of his conduct do the opposite. *See supra* text accompanying note 18. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) establishes that corporate employees of the kind interrogated here fall within the ambit of the attorney-client relationship and must be considered, in essence, the corporation for purposes of communications. Indeed, while the Supreme Court in *Upjohn* noted that instead of procuring interview notes of the corporation's attorneys, counsel for the government might themselves question employees about relevant events, the facts of that decision give no indication that questioning would be proper if conducted behind counsel's back. Rather, the opinion indicated that questioning would occur with appropriate procedural safeguards. Moreover, *Upjohn* was not a criminal case and the corporation had not been indicted. Thus, *Massiah* and its progeny, of course, were inapplicable. Indeed, the facts and relevance of *Upjohn* are so inapposite as to raise questions as to the sincerity of its invocation.

The prosecutor also relied upon *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir.1977) as support for its position. That case too dealt with civil litigation and the question of attorney client privilege with a corporate client. The case did not concern post-indictment activity by prosecutors.

The prosecutor's second *post hoc* rationalization that *Massiah* did not restrict his interrogation because he did not employ subterfuge requires little discussion. The Supreme Court did not base its holding in *Massiah* upon the use of subterfuge. Rather, that opinion was premised on an accused's right to counsel. Thus, in *Brewer v. Williams*, the Supreme Court specifically noted that the fact that "the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant." *Brewer v. Williams*, 430 U.S. at 400, 97 S.Ct. at 1240.

[24] Unlike the situations in *Brewer* and *Massiah*, the interrogation of the bank's representatives was conducted not by an investigatory agent, but primarily by an attorney involved in the prosecution also calling into question a possible violation of that attorney's ethical obligations. Disciplinary Rule 7-104 of the Code of Professional Responsibility provides in relevant part:

> *Communicating With One of Adverse Interest.*
>
> (A) During the course of his representation of a client a lawyer shall not:

The defendants have not, however, demonstrated any prejudice from the interrogations of bank employees in the absence of counsel. The bank's counsel has performed ably and adequately throughout the litigation. Under such circumstances, the Supreme Court has specifically rejected the remedy of dismissal based upon a prosecutor's violation of a defendant's Sixth Amendment rights. "[A]bsent demonstrable prejudice or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981). *See also United States v. Drake*, 655 F.2d 1025, 1027 (10th Cir.1981); *United States v. Kapnison*, 743 F.2d 1450 at 1454 (10th Cir.1984). As in *Morrison*, so it is here:

> [Defendant] has demonstrated no prejudice of any kind, either transitory or permanent, to the ability of [its] counsel to provide adequate representation in these criminal proceedings. There is no effect of a constitutional dimension which needs to be purged to make certain that [defendant] has been effectively represented....

449 U.S. at 366, 101 S.Ct. at 669. Accordingly dismissal of the indictment is an inappropriate remedy for the *Massiah* violations in this case.[25]

The Sixth Amendment abuses were, in some instances, undertaken by the prosecutors appearing before the grand jury. Thus, while not directly implicating actions by the grand jury, such actions do reflect upon the general abuses of the grand jury process practiced by the government. The *Massiah* violations must enter into my general qualitative assessments of the prosecutors' and grand jury's conduct.

## *G. The Totality of Circumstances Test*

**[18]** As I stated in *United States v. Anderson*, 577 F.Supp. 223, 230 (1983):

The Tenth Circuit Court of Appeals has recently articulated the standard to be applied in cases where dismissal of an indictment is sought because of prosecutorial misconduct:

> An indictment may be dismissed for prosecutorial misconduct which is flagrant to the point that there is some significant infringement on the grand jury's ability to exercise independent judgment.

*United States v. Pino*, 708 F.2d 523, 530 (10th Cir.1983). While the remedy of dismissal is extraordinary, it may be used "to insure proper standards of conduct by the prosecution." 708 F.2d at 530. District courts are also empowered to dismiss indictments because of inherent supervisory powers which protect the

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> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

*See United States v. Thomas*, 474 F.2d 110, 111–12 (10th Cir.), *cert. denied*, 412 U.S. 932, 93 S.Ct. 2758, 37 L.Ed.2d 160 (1973). *Cf. Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268 (2d Cir. 1975).

[25] The prosecutor's interrogation and surveillance here is precisely the type of deliberate governmental impropriety that should be discouraged. *See United States v. Owen*, 580 F.2d 365, 367 (9th Cir.1978), *citing Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960); *United States v. Houghton*, 554 F.2d 1219, 1224 (1st Cir.1977), *cert. denied* 434 U.S. 851, 98 S.Ct. 164, 54 L.Ed.2d 120. Insofar as the prosecutor by his own admission was not deterred by the possibility of other available remedies, dismissal remains the only viable prophylactic tool. The Supreme Court has gone to great lengths to explain that the good faith efforts of law enforcement officials should not be overcome by technicalities beyond their control. *See United States v. Leon*, — U.S. ——, 104 S.Ct. 3430, 82 L.Ed.2d 677 (1984). The apposing proposition requires that effective sanctions be imposed to prevent deliberate constitutional violations by law enforcement officials. Constitutional protections are of little value if violations are permitted without the imposition of meaningful sanctions. *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961); *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960). Here, the prosecutor's premeditated interrogation of bank employees behind the back of the bank's counsel plainly violated the Sixth Amendment protections outlined by the Supreme Court in *Massiah* and *Brewer*.

integrity of the judicial system. 708 F.2d at 531. Isolated errors and improprieties do not require dismissal of the indictment. It is only when the government engages in deliberate conduct which interferes with the grand jury's independent function or damages the integrity of the judicial process that the remedy of dismissal becomes necessary. Because I find that the government engaged in a pattern of conduct calculated to infringe the grand jury's ability to exercise independent judgment, the indictments must be dismissed.

* * * * * *

The grand jury is more than a symbol of the limitations the constitution places on the government's power. When the government usurps the grand jury and destroys its independence so that it looks and acts like an arm of the prosecution, the very essence of a government of limited powers is destroyed. *See, United States v. Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1973); *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960).

In *United States v. Samango*, the Ninth Circuit said:

> The Court's power to dismiss an indictment on the ground of prosecutorial misconduct is frequently discussed but rarely invoked. Courts are rightly reluctant to encroach on the constitutionality-based independence of the prosecutor and grand jury.[26] The Court 'will not interfere with the Attorney General's prosecutorial discretion unless it is abused to such an extent as to be arbitrary and capricious and violative of due process.' *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir.), *cert. denied*, 439 U.S. 842, 99 S.Ct. 133, 58 L.Ed.2d 140 (1978).

Nevertheless:

> On occasion, and in widely-varying factual contexts, federal courts have dismissed indictments because of the way in which the prosecution sought and secured the charges from the grand jury.... These dismissals have been based either on constitutional grounds or on the court's inherent supervisory powers.... Whatever the basis of the dismissal, however, the courts' goal has been the same, 'to protect the integrity of the judicial process,' ... particularly the functions of the grand jury, from unfair or improper prosecutorial conduct. (citations and footnotes omitted.)

607 F.2d at 881 quoting *United States v. Chanen*, 549 F.2d 1306, 1309 (9th Cir.) *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977).

From the inception of the twenty-month grand jury investigation when the prosecutors divined the office of "agent of the grand jury" on the IRS agents through the time of the agent's improper "summaries" presented shortly before the indictment was returned, the conduct of the Department of Justice attorneys substantially undermined the ability of the grand jury to exercise independence. The numerous abuses and violations of rules and constitutional principles must be considered particularly serious because of the admissions in these hearings that, for the most part, the activity was undertaken knowingly and purposefully.

In addition to the abuses detailed in this memorandum opinion numerous other instances of misconduct are recounted by Judge Winner in his August 25, 1983 Opinion. In sum, the substantial departures of prosecutors in this case from established notions of fairness, from clearly articulated rules of law, from specific rules of procedure and, indeed from the Department of Justice's own manual and operating directives constitute systematic and pervasive overreaching. There is no doubt that the indicting grand jury was usurped and that time-honored constitutional principles were sullied.

Some of the violations, standing alone, require dismissal. Others, while not singularly requiring dismissal, when combined with one another amount to travesty. What is perhaps most alarming is that even in the very last of so many hearings, one of the prosecuting attorneys continued to refer to the challenge to his and his colleagues' conduct as "silly" and "frivolous." K. Tr. 1137. The supervisory authority of the court must be used in circumstances such as those presented in this case to declare with unmistakable intention that such conduct is neither "silly" nor "frivolous" and that it will not be tolerated.

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[26] In almost seven years on this bench this case and *United States v. Anderson*, *supra*, are the only two instances out of many cases in which I have felt constrained to dismiss an indictment.

The government attorneys, who replaced the prosecutors whose activities are at issue, reluctantly acknowledge that with regard to *at least* two of the procedures employed in this investigation they were "technically inaccurate" and "should obviously not be repeated in the future." *See* Government Response to Defendants' Opening Brief in Support of Motions to Dismiss the Indictment, filed November 14, 1983, at pp. 11, 15. When all the "technically inaccurate" procedures and abuses which "should obviously not occur in the future" are accumulated, what emerges is a picture of an IRS investigation out of control and a grand jury which was converted into little more than a rubber stamp.

The Fifth Amendment guarantees that no person shall be held to answer for an infamous crime "unless on a presentment or indictment of a grand jury." The Supreme Court observed in *United States v. Dionisio*, 410 U.S. 1, 16–17, 93 S.Ct. 764, 772–773, 35 L.Ed.2d 67 (1973) that "[t]his constitutional guarantee presupposes an investigative body 'acting independently of either prosecuting attorney or judge,' *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252, whose mission is to clear the innocent, no less than to bring to trial those who may be guilty." As a result of the conduct of the prosecutors and their entourage of agents, the indicting grand jury was not able to undertake its essential mission. That such is a significant and prejudicial deprivation of these defendant's constitutional rights to due process of law and personal liberty should require no further recitation of authority.

## ORDER

Based on the foregoing I hold and ORDER as follows:

1. The indictment is dismissed because of the numerous violations of Rule 6(d), Fed.R.Crim.P.

2. The indictment is dismissed because of the numerous violations of Rule 6(e), Fed.R.Crim.P.

3. The indictment is not dismissed solely for the use of "pocket immunity" in contravention of 18 U.S.C. §§ 6002 and 6003.

4. The indictment is not dismissed solely for violations of the Fifth Amendment to the United States Constitution.

5. The indictment is not dismissed solely for the knowing and deliberate presentation of misinformation to the grand jury.

6. The indictment is not dismissed solely for violations of the Sixth Amendment to the United States Constitution.

7. The indictment is dismissed because of the totality of the circumstances which include numerous violations of Rule 6(d) and (e), Fed.R.Crim.P., violations of 18 U.S.C. §§ 6002 and 6003, violations of the Fifth and Sixth Amendments to the United States Constitution, knowing presentation of misinformation to the grand jury and mistreatment of witnesses.

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**MARYLAND STATE TEACHERS ASSOCIATION, INC., et al.**

v.

**Harry HUGHES, Governor of the State of Maryland, et al.**

Civ. A. No. M-84-1435.

United States District Court,
D. Maryland.

Sept. 25, 1984.

Class of public school teachers and other state employees brought suit alleging

## STATEMENT OF ROBERT D. GROSSMAN, JR., SENIOR PARTNER, GROSSMAN & FLASK, P.C., WASHINGTON, DC

Mr. GROSSMAN. Mr. Chairman, members and staff of the Oversight Subcommittee, I appreciate the opportunity of appearing before you today.

I am Robert D. Grossman, Jr., a member of the bars of the District of Columbia, and the States of Virginia, Maryland, and Florida.

From 1971 to 1975 I worked as an attorney with the Office of Chief Counsel, Internal Revenue Service, Tax Court Litigation Division, here in Washington. In 1976 I struck out to develop my own law firm, now known as Grossman & Flask, P.C.

On February 24, 1982, I was called by an individual in Denver, CO, by the name of Declan J. O'Donnell, an attorney for one Mr. William A. Kilpatrick. Mr. O'Donnell was told that he was the target of a criminal investigation, and that he could expect to be a defendant in the largest tax shelter case ever brought to that time.

Mr. O'Donnell was panic stricken, and he asked to see me in my office in Washington the very next day. I made time to see Mr. O'Donnell, and we had a meeting.

At all of our meetings we have asked potential clients of ours to disclose each and every fact that he knows, as well as those that are alleged against him, so that we can have some idea of how to best protect and advise our clients.

After a thorough meeting with Mr. O'Donnell for the better part of a day, I came to the conclusion that, under any scenario of the facts, Mr. O'Donnell and Mr. Kilpatrick had committed no crime. What they did may have been right or wrong as a matter of civil tax law; but, at the very worst, I concluded that a civil investigation would have been appropriate, and in no event would a criminal investigation have been appropriate under the facts.

I did this giving the Government's contentions the benefit of every doubt, and assuming arguendo, that what the Government said was so was in fact so.

We decided to undertake the representation of Mr. O'Donnell, who told me that if he were convicted he would lose his license to practice law, could not make a living, who told me that he was a recovering alcoholic and was under enormous emotional strain, and who told me that there had been advanced notice of what was going on with respect to his being a target all around Denver, and that clients were shying away from him. I had great sympathy for Mr. O'Donnell, being an attorney myself, and I sought to do what was best, as I saw it, for him and for Mr. Kilpatrick.

I went to Denver, CO, in the course of representing Mr. O'Donnell, where I met one Steven "Jake" Snyder, who told me he was the lead prosecutor, and that he was going to get a conviction against my client Mr. O'Donnell.

Mr. Snyder often bragged to me that he had never so much as had one course in Federal taxation, but that he was such a gifted advocate that he could convince a jury to convict, irrespective of the merits of this case.

The Honorable Senior Judge Fred Winner, who spoke to you yesterday, wrote an opinion on August 25, 1983, wherein he stated, "Mr. Snyder bragged on frequent occasion that he had never taken a course in taxation and knew almost nothing about it."

However, he was assigned, in any event, from Washington to prosecute what was called "the flagship tax shelter case." It was my opinion that Mr. Snyder was flip, arrogant, rude, ungentlemanly, and basically intransigent. I felt no matter what he saw, he would go forward, and I repeatedly told him this.

In his opinion, Judge Kane states, about the conduct of the prosecutors, that it was "frequently rude, consistently arrogant, and occasionally obnoxious."

As an attorney and as a taxpayer, I am appalled that a representative of the U.S. Government would have those words written about him by a Federal judge.

I had the impression that Snyder wanted to make this case so badly he would have done anything to win, irrespective of consequence.

On May 12, 1982, I sent a 31-page memorandum of law to Mr. Snyder explaining why no crime could have been committed assuming arguendo, all of the facts that Snyder stated existed as he said they did. I sent copies to the Attorney General of the United States, the Acting Assistant Attorney General of the Tax Division, Department of Justice, and the Chief of the Criminal Section.

It took a great deal of time to research and write my memorandum to Snyder. I honestly felt I had done a technically proficient, workmanlike job in analyzing the cases.

On May 28 I had heard nothing from the Department of Justice. I therein requested by letter a conference with Mr. Snyder and his supervisors regarding the substance of my letter.

My client, Mr. O'Donnell, I felt at that time was an attorney whose reputation was being sullied and debased by the publicity surrounding this case; but, on June 10 I received a letter from Snyder, one paragraph long, which says he rejects in toto my analysis of 31 pages and disagrees with my statement of facts.

I thereafter sent Mr. Snyder a letter on June 15, asking him to tell me what facts I had left out or misstated and what principles of law he felt were superior to those which I promulgated to him. My letter was self-explanatory, but it raised the issue of the enormous turmoil and pain and suffering an indictment would necessarily cause to my client. I never heard anything back about that letter.

My June 15 letter reminded Snyder of the enormous power invested in him, and that with that power goes a certain degree of responsibility which I thought was being blithely discharged and ignored. I received no response at all to that letter.

On July 1, I went to a conference at the Department of Justice with Mr. Snyder and his coworker Mr. Blondin and a summer intern, who I asked be dismissed from that conference because she was not a member of the bar. She was dismissed, and I asked to see someone with a tax expertise.

I was shown and presented to one Jared Scharf, who was introduced to me as a reviewer at the Department of Justice and a tax expert. Mr. Snyder represented that Mr. Scharf was a graduate of New York University's Masters Tax Program. I am also an alumni of that program and respect it enormously.

Thereafter, I completely disclosed my theory of the case to Mr. Scharf, on the grounds that anything is worth not having your client indicted, particularly when he is an attorney. I disclosed all my strategy to Mr. Scharf, because I really believed he was a reviewer, because that is what prosecutors Snyder and Blondin had told me.

When I returned to my office, I felt somewhat uneasy about my meeting. My partner John Flask said to me, "Are you sure that you had actually seen a reviewer at the Department of Justice?" I went to our Prentice Hall looseleaf service, and I found that under the name "reviewers" there was no name Jared Scharf. I felt that I was sandbagged, that I was deceived and tricked into disclosing technical portions of my defense to someone that I thought was an objective reviewer, who was not anything more than a phantom. And I was disgusted.

On July 14 I wrote a letter to the Chief of the Criminal Section about my July 1 conference. I had thereafter a phone conversation with one Richard Slivka, an attorney in Denver, who told me that while some targets of the investigation were and others were not accorded conferences, Mr. Scharf was no reviewer, and that I was being deliberately deceived by my own Government.

Apparently, the prosecutors merely told me that Scharf was a reviewer to induce me to believe my case was being objectively reviewed, when in fact it was not.

I asked in my letter that if Scharf were really a reviewer, that Slivka get an apology, because he was being deliberately deceived. And if Scharf were not a reviewer, that I was being deliberately deceived, and that all the prosecutors should be removed from this case. I did this in July, prior to the time an indictment was returned.

On August 13, 1982, I received a letter from the Chief of the Criminal Section which expressed high regard for both the integrity and candor of Scharf, Blondin, and Snyder, and that he had satisfied himself, the Chief did, that my concerns were unfounded.

At my meeting, I went so far as to offer Declan O'Donnell's testimony before the grand jury and to produce a tax law expert who would be unbiased, to tell the jury of the position of the defendant O'Donnell.

Later on, I received a letter from Mr. Scharf and Mr. Snyder which said, "We will not agree to the stipulations contained in your letter," and I sent a letter which said, "I do not agree to nor will I present Mr. O'Donnell nor a tax law expert before the grand jury."

Nonetheless, I received a phone call, on July 19, 1982, that the prosecutors had taken my defendant, Declan J. O'Donnell, before the grand jury, without counsel, to give testimony before that grand jury, and that he had brought with him an expert in tax law, one Roland J. Hjorth from the University of Washington in Seattle, who was recommended to us by a University of Michigan law professor, and that that expert had been bullied and badgered and treated with sleight of hand and a harsh fist by Mr. Scharf and Mr. Snyder.

Mr. O'Donnell was under enormous emotional pressure. He was about to lose his reputation, which is all he had to sell, and on the last day of September 1982, there was issued by the grand jury in Denver a 67-page, 22-count indictment accusing my client of conspiracy, tax evasion, preparation, and a number of tax and conspiracy crimes.

On December 24, 1982, I submitted a memorandum of law to Judge Kane, which was nothing more than a restatement of my May brief to Mr. Snyder.

On February 28, we had a hearing in Denver, CO, and who did I find was my principal opponent? The reviewer, Mr. Scharf, whom I had told all my arguments to. Nonetheless, in less than 1 day, Judge Kane decided that the 67-page, 22-count indictment was insufficient to express a crime, even though all of the allegations taken as the Government saw them were deemed to be true; that is to say that Mr. O'Donnell was indicted of a fabulously large criminal tax fraud, although under no theory of the law could he have committed such a crime, according to Judge Kane.

I was opposed by the very man who was represented to me by the Department of Justice to be a reviewer, and he knew my arguments like you might read some football coach's playbook.

My client has not recovered his legal fees or any restitution for the damage to his good name. The day the indictment was returned in September, there were articles in every major local paper and many national publications setting forth the evil crimes my client had allegedly committed.

Upon dismissal of the 67-page 22-count indictment against my client, the Department of Justice did not provide a retraction or an apology, but rather sent to the newspapers a press release that the judges in Colorado had made mistakes which the Department of Justice was going to appeal.

I remind you that this case was not just heard by one judge, John Kane, but by two judges, one of whom was the senior district court judge for the district of Colorado, both of whom were appalled by the Department of Justice's activities.

I am now prosecuting a case in the U.S. Tax Court civilly, where the Internal Revenue Service is stating that, irrespective of the illegal acts of its special agents, they should not be attributed to the Internal Revenue Service civilly, and that the collection of taxes and deficiency procedures should go forward, and that all Kilpatrick limited partners should not have their cases infected by the poison of the acts of IRS' special agents, and that information that was supposedly secretive in the grand jury can and should be used in making and supporting the civil cases.

I told the judge in the Tax Court, Special Judge Cantrell, that Judge Kane and Judge Winner said what they meant and meant what they said in finding illegalities in the grand jury, and for that reason the burden of going forward in the Tax Court cases should shift. Those cases now are under consideration by the U.S. Tax Court.

It is my view, in light of the above, the Government has invested too much authority in vindictive prosecutors who stand to benefit personally by virtue of the conviction of their prey. In every case it prosecutes, the Government wins. If the defendant is convicted, it has won its case; but if the defendant is acquitted, justice has been done, and the prosecution wins as well.

It is as much the duty of the prosecutor to govern impartially as it is to govern at all. The twofold aim of the prosecutor is that "guilt shall not escape nor innocence suffer." The prosecutor may strike blows with earnest and vigor, but he must strike fair blows not foul ones. "It is as much his duty to refrain from improper methods calculated to produce wrongful convictions as it is to use every legitimate means to bring about just ones."

In my view, the broken victims of Kilpatrick's ugly inquiry should somehow be made whole and not forced to suffer the indignities of public condemnation which are undeserved and the expense of continuing to fight an arrogant, all too powerful, insensitive and callous government.

I would suggest the following:

First. In criminal cases where the prosecution is found by Federal judges to have improperly conducted itself, the actual attorneys fees expended in the defense of the defendant should be reimbursed to him. The Internal Revenue Code section 7430 provides award of attorney's fees in civil cases, but there is no counterpart for criminal cases.

Second. A defendant should be allowed to sue the Government and its personnel to recover damages. He should have the opportunity to prove and collect his damages from the sovereign and the offending Government attorneys, agents, and supervisors. This, it seems to me, would provide a disincentive for the Government to overzealously prosecute and misconduct itself in the prosecution of cases.

Third. Prosecutors such as Blondin, Snyder, Scharf, and their respective reviewers, should be susceptible to dismissal from office in Government service immediately upon the findings of improprieties sufficient to dismiss indictments, and transcripts of proceedings should be sent to their respective bar associations.

In this case, the Office of Professional Responsibility has allegedly conducted an investigation and found nothing was done wrong. The only trouble is, Mr. Kilpatrick was never contacted, I was never contacted, Mr. O'Donnell was never contacted, and this investigation, it seems to me, performed a whitewash rather than a thorough investigation.

Fourth. Finally, it seems to me that where you have these abuses there should not be a promulgation of civil cases, and deficiencies determined against people or their progeny. Wherein abuses have been committed for prosecutorial misconduct, prosecutions ought not go forward. The reason for this is to provide a disincentive for all agents of the Internal Revenue Service from abusing and violating defendants' rights. If civil agents are able to use the fruits of abusive prosecutors' nets, there is an incentive for the Government to continue its abuse of the laws.

In my view, I do not believe the Department of Justice will provide meaningful sanctions to its own personnel. There is a great tendency, in my experience in Washington, for one arm of Government to protect another; therefore, referring this case to Justice's Office of Professional Responsibility resulted in no action against anyone.

I think that, as a pragmatic matter, what I say to you today is more clinical and perhaps not as passionate as the experience that

I have seen and felt; but I can tell you that once or twice a year we run into situations where clients without the resources of a Bill Kilpatrick or a Declan O'Donnell come to us for assistance, and where it is exceedingly difficult to handle those cases with the same degree of aplomb that has been applied to the defense of Mr. Kilpatrick and his cases.

I can only tell you that it is essential that when the Internal Revenue Service comes to you and asks for bows and strings for its weapons, that you be as equally understanding and compassionate for those on the other side of the ledger, those who have been on the barrel as opposed to the trigger end of the gun, those who need as much protection from you as does the public fisc.

Senator **Grassley**. Thank you.

Mr. Waller.

[Mr. Grossman's prepared written testimony follows:]

# STATEMENT OF ROBERT D. GROSSMAN, JR. TO SENATE FINANCE OVERSIGHT SUBCOMMITTEE ON THE INTERNAL REVENUE SERVICE

Honorable members and staff of the Oversight Subcommittee on the Internal Revenue Service, my name is Robert D. Grossman, Jr. I am an attorney admitted to practice law in the District of Columbia, and the States of Virginia, Maryland and Florida. I received my Juris Doctor degree from the University of Florida in 1969 and my Masters degree (LLM.) in taxation from New York University in 1970. In 1971, I went to work for the Internal Revenue Service, Chief Counsel's Office, Tax Court Litigation Division, Trial Branch in Washington, D.C. I commenced my tenure at the Internal Revenue Service in 1971 as a trial attorney and ended my career with that same office as a senior trial attorney in 1975. I worked for the Internal Revenue Service, Office of Chief Counsel for years 1971-1975, inclusive.

During the time during which I worked for the Internal Revenue Service, I was assigned to prosecute cases in the United States Tax Court involving taxpayers of some renown or cases involving substantial amounts of money. These cases involved taxpayers all around the country.

In 1975, I commenced my own practice of law with my partner, Jon T. Flask. Our firm, Grossman & Flask, P.C., currently employs seven attorneys, all of whom specialize in various aspects of federal income tax law and its consequences to our business clients.

I personally have devoted a great deal of attention in my practice to tax controversy work. I currently represent targets of criminal tax investigations in a number of cities around the United States, and taxpayers who have been accused of being abusive tax shelter promoters or of owing substantial amounts of tax. I have represented criminal defendants in tax matters through the investigative stage through sentencing, and post-trial practice.

On February 24, 1982, I was retained by Declan J. O'Donnell, an attorney for Mr. William Kilpatrick from Denver, Colorado, to represent Mr. O'Donnell in a pending criminal investigation by special agents of the Internal Revenue Service and attorneys for the Tax Division, Department of Justice. The investigation involved Mr. O'Donnell, William Kilpatrick and others, both individuals, and in one case a bank. Having been somewhat familiar with the criminal process, I undertook to represent Mr. O'Donnell by requiring him to provide me with all of the facts which he knew about the transactions involved and the government's contentions related thereto.

After analyzing those facts, I quickly came to the conclusion that irrespective of the truth (or falsity) of the government's allegations, Mr. O'Donnell could not, as a legal matter have committed a crime. I concluded the transactions themselves were structured properly as a tax matter and that the worst that could happen would be civil disallowance by auditors resulting in a civil tax contest. In no event under the facts as presented to me did there appear to be criminal wrongdoing.

In other words, even assuming arguendo, the facts as set forth by the lead prosecutor, Steven "Jake" Snyder, no crime was, nor could have been committed. It was with this background that I argued to Mr. Snyder, both verbally and in writing, that this was an extremely inappropriate case for him to pursue criminally because as a legal matter, it did not involve a crime.

I first met Mr. Snyder in Denver, Colorado during hearings before the Honorable Judge Sherman Finesilver regarding discovery. Later, I spoke and met with Mr. Snyder in Washington, D.C. It was on those occasions that Mr. Snyder "bragged" to me that he had never so much as had one course in federal taxation, but that he was convinced a crime under the instant facts had been committed and that he would be able to convince a jury that that was the case. In my view, Mr. Snyder felt he was so gifted an advocate that he could convince a trial jury of almost any proposition irrespective of validity. It was just this bearing and manner which shocked, intimidated, and offended almost all with whom he came in contact.

The Honorable Senior U.S. District Court Judge Fred Winner wrote an opinion on August 25, 1983 wherein he stated "Mr. Snyder (who) bragged on frequent occasion, that he had never taken a course in taxation and knew almost nothing about it." U.S. Kilpatrick, 575 F. Supp. 325 (D. Colo. 1983) hereinafter Kilpatrick I. I will quote from this opinion and U.S. v. Kilpatrick, 594 F. Supp. 1324 (D. Colo. 1984) hereinafter Kilpatrick 2 where relevant to corroborate my testimony.

It was inconceivable to me that the government would entrust its case to so arrogant a prosecutor as Snyder. This is especially so where the government was prosecuting what it called its largest tax case ever, dubbing it its "flag ship tax shelter case."

It was my opinion that Mr. Snyder was flip, arrogant, rude, ungentlemanly, and basically intransigent about this case. I felt no matter what he saw, he would go forward. I repeatedly told him this. However, I shall leave to Judge Kane the responsibility of characterizing Mr. Snyder's behavior. In his opinion, the judge states that the prosecutors were "frequently rude, consistently arrogant and occasionally obnoxious." Kilpatrick 2 at 1334. I believe this characterization is mild.

In my view, Mr. Snyder was continuously "unfair and overreaching", Kilpatrick 1 at 341, and discourteous in his contacts with me. I was amazed and quite concerned at the discretion Snyder had in taking this case every which way, spending taxpayer dollars and refusing to come to terms with the fact that Mr. Kilpatrick had committed no crime.

I had the impression that Snyder wanted to "make" this case so badly he would have done anything to win, irrespective of consequence. He viewed this case as a gun fight. His refusal to intellectually and dispassionately consider the substantive tax arguments fueled my belief that whether Kilpatrick had (or had not) committed a crime was all but irrelevant to Mr. Snyder's determination to prosecute this case through to conclusion. Snyder wanted Kilpatrick's scalp although he frequently and graphically expressed a willingness to accept another part of Kilpatrick's anatomy.

On May 12, 1982, I sent a thirty-one page Memorandum of Law to Mr. Snyder explaining why no crime could have been committed assuming arguendo, all of the facts as Snyder believed they existed. Copies of that memorandum were sent to the Attorney General of the United States, the Acting Assistant Attorney General, Tax Division, United States Department of Justice, the Chief of the Criminal Section and Messrs. O'Donnell and Kilpatrick.

It was this very memorandum that formed the basis for my memorandum of law in support of defendant O'Donnell's Motion to Dismiss the Indictment which ultimately was granted by the Honorable Judge John Kane in Denver on February 28, 1983.

I took a great deal of time to research the law and write my Memorandum to Snyder. I honestly felt I had done a technically proficient, workman-like job in analyzing the cases. Attached hereto as Exhibit 1 is a copy of my May 12, 1982 transmittal letter along with my Memorandum of Law as submitted to Mr. Snyder.

At no time did I hear from the Office of the Attorney General, or the Office of the Acting Assistant Attorney General in response to my Memorandum.

On May 28, 1982, I had heard nothing from the Department of Justice in response to my May 12, 1982 letter and at that time I wrote a letter to the Tax Division, Criminal Section explaining that I had written them on May 12, 1982, but had not heard their views with regard to my letter. I therein requested a conference with Mr. Krysa, Chief, Criminal Section, Mr. Murray, Acting Assistant Attorney General, Tax Division and the Attorney General of the United States to discuss the legal and tax issues presented in my May 12, 1982 letter. I wanted to do this prior to the time that the prosecutors went to the grand jury for an indictment of my client.

My client, Mr. O'Donnell, is an attorney whose reputation was sullied and debased by the publicity surrounding his indictment. In my May 28, 1982 letter, copy attached as Exhibit 2, I stated that I would only need to meet with the supervisors of the Department of Justice for a short period of time to convince them not to go forward and would be willing to answer any questions they might have. I stated in my letter that I honestly and professionally felt it would be an enormous mistake for an indictment to issue in this case. I heard nothing from the Department of Justice until June 10, 1982 when Mr. Snyder wrote me a letter signed by Mr. Krysa, copy attached as Exhibit 3, which was one paragraph in length advising me that Mr. Snyder and Blondin, another prosecutor rejected my analysis "en toto" (sic).

It seems to me that where a defendant goes to the expense of drafting a lengthy technical Memorandum of Law which ultimately is accepted by the presiding judge in one afternoon, that the least the Department of Justice could do in a criminal case would be to set forth their basis for their conclusion that the Memorandum is incorrect.

Further, I think that the June 10, 1982 letter, Exhibit 3, generally shows that Mr. Krysa, Chief Criminal Section was nothing more than a rubber stamp for the feelings and overreaching of Mr. Snyder, who drafted that letter as can be seen from an examination of the top left hand portion of the exhibit.

Thereafter, I wrote a letter on June 15, 1982 to Mr. Snyder requesting that he set forth any of the facts which might have been omitted from my Memorandum and specify what his basis was for disagreeing with my conclusion. My letter was self-explanatory but raised the issue of the enormous turmoil, pain and suffering which an indictment against my client would necessarily cause. I did not believe that my Memorandum had been seriously read. I further believe the flip statement of Mr. Snyder that he rejected my interpretation "en toto" (sic) considered quite lightly the gravity of the charge to the defendants and importance of my legal analysis.

In my June 15, 1982 letter, I have reminded Mr. Snyder of the enormous power invested in him and that with that power goes a certain degree of responsibility which I thought was being blithely discharged and ignored. I received no response at all to my June 15, 1982 letter.

Next a June 17, 1982 letter, addressed to the wrong street address, but hand-delivered to me on July 1, 1982 was sent to me from Mr. Blondin inviting me to a conference on that same day at 10:00 a.m. Messrs. Blondin and Snyder offered me in a previous phone conversation the opportunity to meet with them and possibly a "tax expert" reviewer who was quite capable of understanding the technical arguments which I had set forth in my May 12, 1982 Memorandum. I felt at least their "reviewer" would give dispassionate consideration to my argument.

When I arrived at the Department of Justice on July 1, 1982 for my meeting, I went to Mr. Blondin's office where I sat down with Messrs. Blondin and Snyder and a summer intern who was working at the Department of

Justice. I objected to the presence at our meeting of the summer intern on the grounds that since she had not been admitted to the bar, and my communications with the two government attorneys was to be of a settlement nature, that my conversation would not enjoy privilege should she be present. The prosecutors agreed with my concern and dismissed the summer intern.

At all times during the July 1, 1982 conference, I felt there was something wrong and that my legal analysis was not really being given serious consideration. I believed that someone familiar with the law of income taxation would attend the conference so that I could explain my theory to someone more familiar with the complexities of the tax law than admittedly were Messrs. Blondin and Snyder. There had been no serious question that neither Snyder nor Blondin were tax lawyers.

Snyder never really seemed to focus on or care about the importance of there being a tax crime. He ignored entirely the anquish and pain that a target of an investigation necessarily endures, as well as the notoriety he faces upon the issuing of an indictment and press releases by the Department of Justice.

I genuinely felt Mr. Snyder was an extremely callous individual on whom was lost the unfairness of the investigation. In my view, Snyder was so caught up with visions of newspaper headlines announcing his victory in the flagship tax shelter case that he became unconcerned with anything else, including the rights and reputations of the defendants. I saw this as more than regrettable, I saw it as alarming.

Finally, Mr. Snyder brought into the meeting one Jared Scharf who was introduced to me as a reviewer. I had never heard of Mr. Scharf before, but Mr. Snyder represented that Mr. Scharf was a graduate of New York University's Masters Tax Program. I am also an alumni of that program and respect it enormously. After Mr. Scharf was brought into the room, I completely disclosed to him my strategy and theory in this case believing that he was familiar with tax law and would appreciate my arguments. Mr. Scharf made notes of my statements and said that he would consider my arguments.

Upon my return to the office, I felt very uneasy about having made all of my disclosures to Mr. Scharf. I must confess that I never fully trusted Mr. Snyder's representations and I reviewed my Prentice Hall looseleaf service for the status of Mr. Scharf. I was shocked to find that in my looseleaf service Mr. Scharf was not listed as a reviewer. I felt extremely foolish in having accepted Mr. Snyder's word on this. I was betrayed by representatives of my government.

On July 14, 1982, I wrote a letter to Mr. Krysa about my July 1, 1982 conference, copy attached as Exhibit 4. In my letter, I stated that Messrs. Blondin and Snyder represented Mr. Scharf to be a reviewer with the criminal section. I transmitted a copy of page 39, 968 of the then current Prentice-Hall list of reviewers of the criminal section. Mr. Scharf's name did not appear there. Further, Mr. Blondin represented to Richard Slivka, an attorney for another target in the case, that Mr. Scharf was indeed not a reviewer. I stated in my July 14, 1982 letter at page 2 "apparently, the prosecutors merely told me that (Scharf was a reviewer) to induce me to believe my case was being objectively reviewed, when in fact it was not." I further stated that if Scharf were a reviewer, Mr. Slivka was being deliberately deceived, and if Mr. Scharf were not a reviewer, then I was being deliberately deceived. I also asked that the prosecutors be removed from the case because their conduct in deliberately deceiving counsel contravened the Code of Professional Responsibility DR 1-102(A)(4) as well as the standards of conduct for their office. I requested prompt and immediate action and served a copy of that letter on Snyder and Blondin, my clients, and Mr. Slivka.

On August 13, 1982, I received a letter from Mr. Krysa written by a R.A. Cimino informing me that Scharf was an acting reviewer and that Mr. Krysa "wished to advise me that his office has a high regard for both the integrity and candor of Scharf, Blondin and Snyder," and that he had satisfied himself that my concerns were "unfounded." Attached hereto as Exhibit 5 is a copy of the August 13, 1982 letter.

I think that the lack of true consideration as to the character of the prosecutors and the weaseling by Mr. Krysa about Mr. Scharf's position as an "acting" reviewer are appalling.

As mentioned, during the July 1, 1982 conference, I discussed the prospect of presenting Mr. O'Donnell to the grand jury under certain conditions, along with a tax expert to tell the grand jury why we were right on the law. On July 2, 1982, I wrote a letter to Mr. Snyder repeating the conditions under which Mr. O'Donnell and an expert would agree to appear before the grand jury. On July 14, 1982, Mr. Snyder wrote me a letter, copy attached as Exhibit 6, stating that he did not agree to the conditions set forth in my July 2, 1982 letter for the appearance of Mr. O'Donnell before the grand jury.

On July 16, 1982, I wrote Mr. Snyder a letter which stated in part "because your impressions of our meeting so substantially differ from mine and because what you have promised is not of equal value to that which we have promised, I have advised Mr. O'Donnell not to appear before the Denver grand jury, nor to produce any experts for it." Exhibit 7.

You can imagine my surprise when on the morning of July 19, 1982, I received a phone call from Mr. O'Donnell stating that he was undergoing examination before the grand jury. I was livid. Further, I understand that professor Roland Hjorth who testified before the grand jury as a tax law expert was berated, browbeaten and ridiculed by Mr. Snyder because he expressed a different point of view from that held by Snyder. Kilpatrick 1 at 333.

I understand Professor Hjorth was selected by Mr. O'Donnell because Hjorth was recommended by a professor at O'Donnell's law school, the University of Michigan.

I had long suspected that Mr. O'Donnell, a recovering alcoholic was undergoing enormous mental pressure and that his judgment was impaired and compromised by the pressure of the pending indictment. I was absolutely outraged when I found that after delivery of my letter to Mr. Snyder refusing to present Mr. O'Donnell to the grand jury, that Mr. Snyder nonetheless decided to secure the testimony of Mr. O'Donnell without my presence and contrary to my advice. Attached hereto is a copy of the first page of Mr. O'Donnell's grand jury testimony as Exhibit 8. See Kilpatrick 1, *supra* at 336.

I believe that the prosecutor's decision to present Mr. O'Donnell to the grand jury under these circumstances violates Massiah v. United States, 377 U.S. 201 for two reasons which were set forth with specificity at Kilpatrick 1, p. 336, by Judge Winner.

In October, 1982, notwithstanding all of the above, Mr. O'Donnell, Mr. Kilpatrick and six other defendants were indicted on a 67 page 22 count indictment. On December 24, 1982, I submitted a Memorandum of Law in support of defendant O'Donnell's Motion to Dismiss the Indictment. This Memorandum of Law was nothing more than a restatement of my May 12, 1982 Memorandum to Mr. Scharf, the Chief Criminal Section, the Acting Assistant Attorney General Tax Division, and the Attorney General himself. On February 28, 1983, I appeared in court to argue my Motion to Dismiss. I was astounded to find that my opponent on the motion was none other than the purported "reviewer", Jared Scharf, to whom I had confided all of my theories of the defense of this case. Notwithstanding his enormous advantage in knowing my strategies from our July 1, 1982 meeting when I was told that he was a reviewer. I prevailed on my motion and Judge Kane ruled that the 67 page, 22 count indictment was defective because it did not state a crime, except for one count not applicable to 7 of the 8 defendants.

It took a further group of hearings before Judge Kane to convince him that the indictment should further be dismissed on the grounds of prosecutorial misconduct. My client has not recovered his legal fees or any restitution for the damage to his good name. The day the indictment was returned, there were articles in every major local paper and in many national publications setting forth the evil crimes my client had alleged committed. Those press releases were sent out by the Department of

Justice. Upon dismissal of the sixty-seven page, twenty-two count indictment against my client, Justice did not provide a retraction, but rather sent to the newspapers a press release that the Judges in Colorado had made a mistake which Justice was going to appeal.

Currently, the Department of Justice has seen fit to appeal the Kilpatrick cases to the Tenth Circuit Court of Appeals costing Mr. O'Donnell additional legal fees. Meanwhile, IRS has taken the civil tack of stating in the U.S. Tax Court in Olson v. Commissioner et. al, Tax Court Docket No. 15651-82 that the illegal acts of the IRS special agents should not be attributed to IRS civilly and that deficiency notices sent to Kilpatrick limited partners are not infected by the poison of the acts of the special agents in the grand jury. In other words, IRS says for civil tax purposes ignore the Kilpatrick cases and let's get on with collecting tax.

Accordingly, I am prosecuting a motion to shift the burden of going forward in the Tax Court from my clients, the petitioners in those cases, to the government on the grounds that Judge Kane said what he meant and meant what he said when he found illegalities and improprieties in the grand jury. The government takes the position that the Judge could not have said what he meant or meant what he said in his opinion. Kilpatrick 2.

It is my view in light of the above, the government has invested too much authority in vindictive prosecutors who stand to benefit personally by virtue of the conviction of their prey. I do not believe that the prosecutors looked upon their mission as attempting to do justice.

In every case it prosecutes, the government wins. If the defendant is convicted, it has won in its case. If the defendant is acquitted, justice has been done and the prosecution wins in that case as well.

It is as much the duty of the prosecutor to govern impartially as it is to govern at all. Berger v. U.S., 295 U.S. 78. "The two-fold aim of (the prosecutor) is that guilt shall not escape nor innocence suffer." The prosecutor may prosecute with earnest and vigor, but while he may strike hard blows, he may not strike foul ones. "It is as much his duty to refrain from improper methods calculated to produce wrongful convictions as it is to use every legitimate means to bring about a just one." Berger v. U.S., Id.

Here something that is involved in the seemingly infinite and complex process of tax prosecutions has gone awry. There are compelling reasons to change the system or provide safeguards and remedies for those entangled in a tax prosecution's inescapable web. The broken victims of Kilpatrick's ugly inquiry should somehow be made whole and not be forced to suffer the indignities of public condemnation which are undeserving and the expense of continuing to fight an arrogant, all too powerful, insensitive and callous government. How can one forget the Department of Justice continued to express "high regard" for the integrity and candor of its prosecutors (Exhibit 5) in the face of their despicable acts.

## Suggested Legislation

In order to avoid further injustice, I would recommend the following legislation be enacted immediately.

1. In criminal cases where the prosecution is found to have improperly conducted itself, the actual attorney's fees expended in the defense of the defendant should be reimbursed to him. Internal Revenue Code §7430 provides the award of attorney's fees in civil cases but has no criminal counterpart.

2. A defendant should be permitted to sue the government and its personnel for and recover damages. He should have the opportunity to prove and collect his damages from the sovereign and the offending government attorneys, agents and supervisors. This will provide a disincentive for the government to overzealously prosecute and misconduct itself in the prosecution of a case;

3. Prosecutors such as Blondin, Snyder and Scharf and their reviewers should be dismissed from government service immediately upon the findings of improprieties sufficient to dismiss indictments and transcripts of proceedings should be sent to their respective bar associations for whatever actions they deem appropriate; and

4. Civil cases should be halted and no deficiencies determined or asserted where there has been prosecutorial misconduct. The reason for this is to provide a disincentive for all agents of the Internal Revenue Service from abusing and violating a defendant's rights. If civil agents are able to use the fruits of abusive prosecutors' nets, there is an incentive for the government to continue its abuse of the laws.

## Conclusion

In my view, I do not believe that the Department of Justice will provide meaningful sanctions to its own personnel. There is a great tendency for one arm of the government to try to protect another. Therefore, referring Kilpatrick 1 to Justice's Office of Professional Responsibility resulted in no action against anyone.

Further, in the civil cases the government has attempted to distinguish its prosecution there from its illegal conduct in the criminal cases. There is one government and it should be made to account and be responsible for its actions in all cases.

Finally, under RICO, 18 U.S.C. 1963, the government feels it is entitled to take the fruits of alleged criminality from the defendant prior to trial or appeal. The government takes the position that this entitles it to take proceeds from a target or defendant so as to deprive him of the necessary funds to defend himself. This appears to violate the 6th Amendment to the U.S. Constitution.

As a pragmatic matter, no defense attorney would want to defend a defendant where the attorney could not be assured of payment. The law should be made clear that defense attorneys will be able to be paid, notwithstanding claims of RICO violations.

Having worked for the government for four years and having been in my own practice for over eleven years, I can honestly say that the Kilpatrick case is not the only one I have seen that has demonstrated government abuse so graphically and poignantly. Almost once or twice a year I run into cases where the arrogance and callousness of the government and its agents is quite clear.

When the government puts accusations down on paper, they somehow seem to take on an authenticity and credibility of their own. The idea that no defendant is guilty until so proven beyond a reasonable doubt should arguably have more currency than it does but that issue is not before this committee. This subcommittee should recommend legislation that embodies the four remedies set forth above to provide some retaliatory weapon for taxpayers and incentives for government personnel to abide by law. The government perpetually comes to you asking for additional weapons for its arsenal to attack taxpayers. It appears to me that it is now time for a balance to be struck, and for relief to be provided for those who are the victims of government investigations gone haywire or "run amok" Kilpatrick 1 and 2.

Dated: 6/12/86

Robert D. Grossman, Jr.

ROBERT D. GROSSMAN, JR.

EXHIBIT 1

May 12, 1982

Mr. Steven L. Snyder
U.S. Department of Justice
Tax Division
Criminal Section
10th and Pennsylvania Ave., N.W.
Room 4611
Washington, D.C. 20530

Re: Declan J. O'Donnell -
Denver Grand Jury

Dear Mr. Snyder:

As promised in our April 14, 1982 phone conversation, there is transmitted herewith a Memorandum of Laws in connection with my above client, Declan J. O'Donnell. Because of the importance and significance of your pending investigation and that of the Denver Grand Jury as they relate to my client, and at your invitation to do so, copies of this memorandum are being sent along with copies of this transmittal letter to the Honorable William F. Smith, Attorney General, John F. Murray, Acting Assistant Attorney General, Tax Division and Stanley F. Krysa, Chief of the Criminal Section.

Should you have any questions, comments or if anything contained herein as a factual representation is not entirely accurate, please don't hesitate to contact me immediately.

Very truly yours,

GROSSMAN AND FLASK, P.C.

By____________________________
ROBERT D. GROSSMAN, JR.

RDG:mib

cc:
w. Encls. The Hon. Wm. F. Smith,
Attorney General

John F. Murray,
Acting Asst. Attorney General,
Tax Division

Stanley F. Krysa,
Chief of the Criminal Section

D. J. O'Donnell
Wm. A. Kilpatrick

## MEMORANDUM OF LAWS

## FACTS

Declan J. O'Donnell (hereinafter O'Donnell) is currently denominated as a target of the Grand Jury presently convened in Denver, Colorado. The prosecutor in charge of the investigation, Steven L. Snyder (hereinafter Snyder or the prosecutor), is an attorney with the Criminal Tax Division, Department of Justice, Washington, D.C.

O'Donnell, a Notre Dame Arts and Sciences graduate and University of Michigan Law School graduate, is an attorney admitted to practice in the States of Michigan and Colorado. He commenced his legal career as an attorney adviser to then Governor John A. Love of Colorado. Subsequent to his service to Governor Love, O'Donnell entered the private practice of law with the then Denver, Colorado law firm of Costello, Kofoed & O'Donnell, in which he was a partner. That partnership eventually terminated, in part due to personal problems encountered by O'Donnell caused by his first marriage and alcohol abuse.

After the termination of his law partnership, O'Donnell practiced as a sole proprietorship and developed real estate. He remarried and was subsequently divorced a second time. Unfortunately, O'Donnell continued to have serious problems with alcohol throughout this period. In 1976 O'Donnell sought and received help from Alcoholics Anonymous and married for a third time to his present spouse, who has recently delivered their second child. O'Donnell has two children from his first marriage.

In 1977 O'Donnell was employed by Mr. William Kilpatrick (hereinafter Kilpatrick), another target of the current Denver Grand Jury. Since 1977, O'Donnell has been deeply involved with both the structure and defense (more specifically the prosecution in Tax Court) of "tax shelter investments". 1) Accordingly, O'Donnell has specialized in tax advantaged investments and their legal consequences for at least the past six years. His firm represents many unrelated clients in this area.

From 1977 - 1980, inclusive, O'Donnell counseled Kilpatrick and United Financial Operations (hereinafter UFO), as their attorney in the preparation of certain private placement memorandums offering tax sheltered investment opportunities to qualified potential purchasers. The O'Donnell law firm included reputable attorneys with Master of Law Degrees in taxation during most of this time.

Currently, the Denver Grand Jury is considering the issue of whether to indict O'Donnell for his role as counsel to Kilpatrick and UFO or as a coventurer with Kilpatrick and UFO in the legal construction, preparation of memorandums and sale of units in these investments. O'Donnell has never heretofore been charged with any major crime or offense by any sovereign.

Snyder currently plans to seek indictments of the targets on Internal Revenue Code (hereinafter Code) §§7201, 7206(1) and 7206(2) grounds and on account of alleged violations of 18 USC §371 and unspecified mail fraud statutes.

It is the position of O'Donnell that such a case should not be brought and no indictment returned against him for the below stated reasons and because the mere bringing of such an indictment against O'Donnell under these highly unusual, complex and emotionally charged circumstances will have the lethal effect of all but decimating O'Donnell's professional reputation in the community along with his ability to earn a living in his chosen profession (because of the inherent stigma and sensationalism an indictment necessarily carries with it, particularly for a member of the bar and especially in the case of a tax shelter expert) even though it is the position of the undersigned that O'Donnell would be ultimately acquitted and his legal position and conduct fully vindicated at trial. The emotional trauma and pressure attendant to this investigation on

O'Donnell, an admitted alcoholic, his wife and his young family is already substantial and quite regrettable.

While the enormous and unbridled power and resources of the government are sufficient to break almost any man (and his family) when vented against him, it would seem that civilized societies should require governments to act responsibly and compassionately in appropriate cases. It is submitted that when, as here, the government's case is too weak to carry its proof burden at trial, prosecutorial discretion should be employed to put an end to the target's torment prior to rendition of the indictment. The case for stopping the instant Grand Jury investigation now is compelling because many of the government's allegations even if proven would be insufficient as a matter of law as a basis for a criminal prosecution. Accordingly, it is submitted that some time should be taken by the prosecution to reflect upon the merits of this case as a tax case apart from the constant and relentless steps now being taken to gather what is considered by the undersigned to be irrelevant facts and "evidence".

On April 14, 1982, Snyder and the undersigned had two extended phone discussions regarding this case. Snyder told the undersigned that while the government would not disclose the contents of its prosecution memorandum, because such memorandum contained discussions of privileged trial strategy and related tactics, 2) the government would nevertheless disclose its theory of the case to the undersigned.

Snyder stated over four times during the April 14, 1982 phone discussion that his case rests exclusively on the premise that the financing format ("money circles" or "check loops") used to "leverage" 3) the 1977 and 1978 coal shelters and the 1979 and 1980 methanol shelters lacked any economic substance whatsoever and amounted to "shams" or frauds perpetrated by the targets on the government. It is from this premise that all counts against O'Donnell arise. If the financing or method involved in "leveraging" the shelters have any tax substance or significance whatsoever, the government's case admittedly must fail. Snyder repeatedly stated during his April 14, 1982 phone discussions that if the "money circle" or "check loop" is determined to be valid or at the very least non-criminal he would willingly "walk away from the case" regardless of the government's time and energies expended to this point. Snyder stated he simply would neither bring nor conduct a criminal case against the targets predicated on the grounds of *Code* §§465 4) (the "at risk" provision) or 269 (related party loss provision) or Subpart F (controlled foreign corporations), *Code* §951 *et seq.*). Because of Mr. Snyder's said representation, this memorandum will not address these issues which both parties agree are to be decided, if at all, in the civil arena.

The targets take the prosecutor at his word that the case will be dropped if a convincing case can be made justifying the financing mechanism. Accordingly, this memorandum is written to address that issue.

While Snyder mentioned a case (presumably Bennett or Burnett) he felt was on point during the April 14, 1982 conversations, he later (April 15, 1982 at approximately 5:30 p.m.) called to correct himself and state he relied on *U.S. v. Clardy*, 612 F.2d 1139, 45 AFTR 2d 80-982, (9th Cir. 1980) as his legal basis for the instant prosecution. It is essential therefore that the shelters' financing formats be examined in detail and in light of *Clardy*, *supra*. If the tax shelter models used by UFO and Kilpatrick are demonstrated to be valid, the prosecution must cease immediately. Below the two basic tax shelter models used during the years at issue are described and charted. Thereafter, their legal significance and consequences are discussed.

## COAL

The coal tax shelters were initially offered in 1977 (i.e., Arapahoe - Dakota, Inc.) and subsequently offered again in 1978 through a series of programs. Generally, the programs involved an investor purchasing an eight year coal sublease on coal in place from a company for which O'Donnell was the attorney. Investors paid certain yearly uniform advance minimum royalty payments which are clearly deductible. Each investor borrowed [5)] a part of his uniform advance minimum royalty payments from P & J Coal Co. (hereinafter P & J). Repayment of the borrowed P & J funds was secured and the loan collateralized by production payments on the coal in place. P & J also had the right to buy the first few thousand tons of investor coal mined at a favorable price. All of this information was fully, repeatedly and in detail set forth in written documents which accompanied all sales materials. P & J was also the contract miner for the investor pursuant to a cost plus contract. There has never been any allegation that the relationship between P & J and the Sublessor was anything other than arms length.

O'Donnell took the position that under the above facts all royalty payments (both advance minimum as well as production) by the investors to the Sublessor (the firm selling the sublease, i.e., Arapahoe - Dakota, et al.) were deductible to the investor. As a matter of tax law, O'Donnell's position is technically correct. The prosecutor does not join issue on the technical propriety of the transaction (he feels at best the technical issues are civil matters) but simply feels in substance the transaction does not comport with its form.

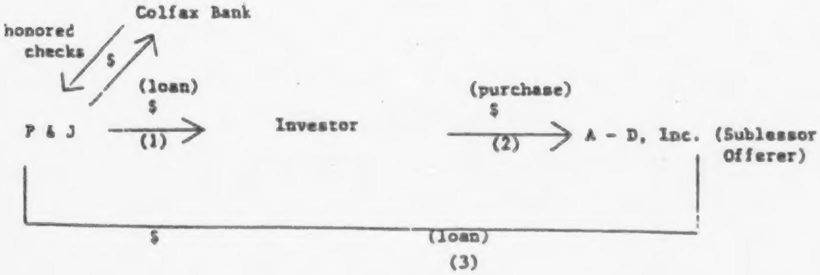
It is undeniable (and Snyder does not in fact deny) that the Sublessor sold and actually delivered to the Sublessees (Investors) a coal sublease for a term of years on the relevant property. There is no doubt as well that the advance minimum royalties on the coal in place were in fact paid, nor that coal in place purchased by the Investors does exist and underlie the property. After years of investigation even Snyder reluctantly admits the existence of investor coal.

While the original subleases related to North Dakota property, the subleases were later amended to include reserves as well located in the Pocahontas seam in West Virginia. The investors benefited by these sublease amendments by having rights to mine both the lesser North Dakota reserves which were lignite as well as the richer West Virginia bituminous reserves. In fact, at the time of the sublease amendment the West Virginia reserves covered coal in place then selling for over $90.00 per ton at the pit. West Virginia investor subleases are in full force and effect today.

The coal financing format can be described as follows. P & J lent funds to individual investors (1). See footnote 5 infra.

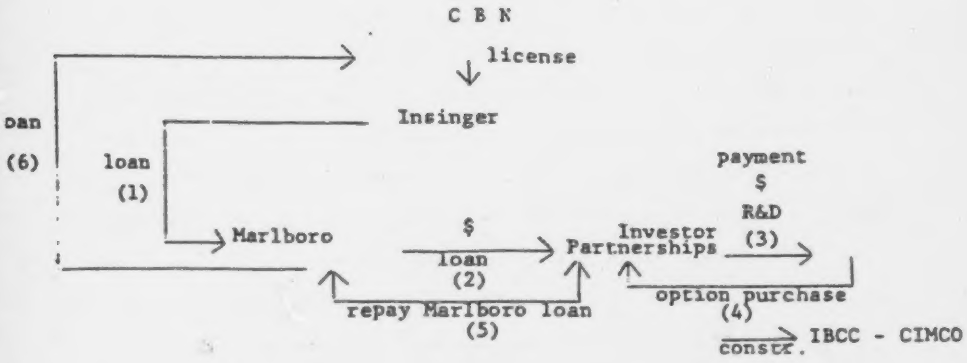
Simultaneously the investors purchased their subleases from the Sublessor offeror by paying the Sublessor offeror certain deductible advance minimum royalty payments in the form of cash, procured in part from the P & J loan and in part from the investor's own pockets (2). The Sublessor offeror next granted an interest bearing loan to P & J (3). The initial P & J loans were accomplished through a Denver bank (Colfax) which honored the initial P & J checks to investors. This amounted to a bank loan from the bank to P & J. As previously stated, the loan by the Sublessor offerer to P & J was an interest bearing loan. It undoubtedly facilitated and made possible investor payments by assuring Colfax that its agreement to honor P & J checks would not result in losses to Colfax. Actually, each offering memorandum stated that credit arrangements existed between Sublessor and P & J.

Schematically the above described coal transaction cash flow looks like this.



## METHANOL

The methanol programs were a bit more complex. There, Insinger, Williams and Cie, a 204 year old Dutch credit institution with no ties to any of the targets obtained a license from the Central Bank of the Netherlands to factor $319,000,000 of accounts receivable from International Fuel Development Corp. (IFDC), a Cayman corporation. Insinger also made substantial loans to Marlboro secured by real estate. Simultaneously, Marlboro lent the funds to various Investor Partnerships in return for promissory notes, which it pledged to Insinger. Investor Partnerships purchased for cash (generated from the Marlboro loan and from the constituent partners' own pockets) plus promissory notes territorial rights to R&D contracts (payments of which are currently deductible in the year paid under Code §174) to IFDC. Simultaneously, the Investor Partnerships entered into construction contracts with a Cayman, West Indies construction company, in 1979 International Block Construction Co. (IBCC) and in 1980 Cayman Investment Management Co. (CIMCO) to build plants to produce the methanol produced from the Allen Methanol Conversion Process (hereinafter the Allen process) funded by investor research and development proceeds. As part of the R&D contract, IFDC purchased from the Investor Partnerships an option to buy the Allen plants and process for 200% of their cost to the Investor Partnerships. The government contends it can prove that after the above Cayman companies received their proceeds, funds were transferred back to Marlboro and, in turn, to the Insinger firm, first in the form of the above described option proceeds from IFDC to the Investor Partnerships, next as loan repayments by the various Investor Partnerships to Marlboro and finally, as payments by Marlboro to Insinger. Financing and cash flow of the methanol transactions can be diagrammed as follows:



There is no doubt that in the case of the coal, reserves are in the ground and in the case of methanol, funds have been expended and a patentable process developed under a version of the Allen method, territorial rights to which are property of various Investor Partnerships.

## ISSUE PRESENTED

Taking the prosecutor at his word the only issue presented for resolution is as follows.

1. Does the above described "money circle" or "check loop" amount to the perpetration of a fraud or sham transaction under tax law and under the Clardy, supra doctrine?

## CONCLUSION

1. No.

## DISCUSSION

## THE CLARDY CASE

The prosecutor states his primary theory in this case is predicated on the successful prosecution theory in Clardy v. U.S., 612 F.2d 1139, 45 AFTR 2d 80-982 (9th. Cir. 1980). In Clardy, id., a Santa Rosa, California "investment advisor" counseled three of his clients in December, 1971 to "buy" property from a fourth client of his just prior to year's end. The Court found the proposed purchase was never serious nor in good faith but merely conceived and constructed by the defendant to build a paper facade with which to secure prepaid interest deductions for the benefit of the defendant's clients. In one case the purported "buyer" signed an agreement to "purchase" the land upon defendant's advice on December 2, 1971 for $5,856 per acre without discussing or evaluating the purchase price or ever obtaining an appraisal. The first Clardy, id., "purchaser" just accepted the defendant's word that the price was fair. The "purchaser" did not have proceeds with which to "buy" the property or any planned method of financing the purchase. The transaction was accomplished through defendant's own hand when he drafted counterbalancing checks payable from and to the order of his own escrow account and made a series of book entries to "support" them. Neither the "buyer or seller" knew of the deposit of the checks or any other details of the transaction. Id., at AFTR 2d 80-985. The checks included "prepaid interest" 6) for the seller which he simultaneously "lent" the borrower, presumably to enable the buyers to prepay interest to seller. Both the jury and appeals court found "nothing about the transaction was taken seriously on either side". id., at 80-984.

Not only did the reputed "buyer and seller" never part with, loan or receive proceeds but approximately three months later the entire transaction was "reversed" and the parties were, through the "magic" of a series of reverse book entries, entirely restored to their pre-December 2, 1971 positions. All this occurred while the land in question was really being offered for sale by a legitimate real estate broker representing the seller at a price approximately one fifth of the sham transaction price. On February 25, 1972, the land in question was really committed for sale under a bona fide sales contract for $1,750 per acre (compared with the sham $5,856 price). The sales contract was signed by a bona fide third party buyer and the seller under the sham transaction. Had defendant's transaction any substance the contract would have had to have been signed by the buyer under defendant's transaction as he would have been the owner on February, 1972. On March 2, 1972 (prior to the April 15, 1972 filing date) defendant made the reverse book entries which restored the parties to their pre-sham transaction status. Accordingly, deductions were taken on returns filed after reverse entries collapsed defendant's paper trail. The land was finally deeded over to the third party buyer in May, 1972.

It can clearly be seen that the jury's verdict in Clardy, supra was supportable. Where mere paper sets up and almost immediately thereafter collapses a transaction (particularly where all is accomplished before the due date of the return) unsupported by any substance whatsoever, the book entries on paper can easily have the effect of misleading the government's revenue agents on audit. In fact, Mr. Clardy obviously intended this result to occur and was convicted and his conviction sustained on account thereof. The lesson of Clardy, id., is that a transaction entirely devoid of economic substance, created only by a paper trail is itself a fraud on the government. In Clardy, id., the paper trail purported to evidence the occurrence of a bona fide transaction for deduction purposes and a revenue agent's consumption and reliance when in fact no such transaction ever occurred. When deductions are taken on account of and in connection with the generation of such a paper trail, a tax offense under Code §7206(2) has occurred. Clardy, id., stands for the proposition that perpetration of a sham transaction, one entirely devoid of any economic substance whatsoever and effected solely to deceive the government's auditors can result in a criminal conviction.

In the instant case, the government is accusing the targets of committing a Clardy, id., Code §7206(2) offense by creating a sham financed by a "money circle". The prosecutor claims all counts of his indictment will rely on the shelter models as being sham transactions where the promoters sold something they did not in fact have, to wit, leverage. 7)

### A. TO CONSTITUTE ILLEGAL AND CRIMINAL SHAM TRANSACTIONS AND RELATED TAX DEDUCTIONS, TRANSACTIONS MUST BE ENTIRELY DEVOID OF ECONOMIC SUBSTANCE. IF THERE IS ANY ECONOMIC SUBSTANCE WHATSOEVER, IT IS NOT THE EXISTENCE BUT RATHER THE SIZE OF THE RELATED TAX DEDUCTIONS WHICH MUST BE EXAMINED. SUCH EXAMINATION (AS TO THE SIZE BUT NOT THE EXISTENCE OF TAX DEDUCTIONS) IS STRICTLY A MATTER OF CIVIL AND NOT CRIMINAL TAX INQUIRY. THE INSTANT SHELTER MODELS ARE NOT DEVOID OF SUBSTANCE. INVESTOR PURCHASED AND HAD DELIVERED TO THEM ITEMS OF SUBSTANCE.

It is axiomatic that it is the legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits. "One may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes." Gregory v. Helvering, 69 F.2d. 809, 810, 13 AFTR 806, at 807 (2d Cir. 1934) aff'd 293 U.S. 465, 14 AFTR 1191 (1935).

As far back as 1873, the Supreme Court held that "if a device is carried out by means of legal form, it is not subject to legal censure". U.S. v. Isham, 17 Wall 496, 2 AFTR 2304 at 2308 (1873). To illustrate this point, the Court in Isham, id., stated

> The Stamp Act of 1862 imposed a duty of two cents upon a bank-check, when drawn for an amount not less than twenty dollars. A careful individual, having the amount of twenty dollars to pay, pays the same by handing to his creditor two checks of ten dollars each. He thus draws checks in payment of his debt to the amount of twenty dollars, and yet pays no stamp duty. This practice and this system he pursues habitually and persistently. While his operations deprive the government of the duties

> it might reasonably expect to receive, it is not perceived that the practice is open to the charge of fraud. *He resorts to devices to avoid the payment of duties, but they are not illegal.* (Emph. Supp. 2 AFTR at 2308)

The law then, as enunciated by the Supreme Court, will not ignore a transaction and disregard it for tax purposes as a sham even where its sole and admitted purpose is tax avoidance, so long as there is a modicum of substance, i.e., the payment of twenty dollars. Accordingly, if there is even a shred or scintilla of economic substance to the instant transactions, no prosecution can properly obtain. Since the prosecutor candidly admits to there being investor coal in the ground (in place) and an Allen Methonal Conversion Process, the territorial rights to which are owned by the investors, the prosecution should properly cease.

It is respectfully submitted that the real issue between the parties is a civil one, involving the size and not the existence of the deductions created under the targets' tax shelter models and that proper attack on the transactions, if any, is through the Commissioner's office on the civil side. *Bowen v. Commissioner*, *infra*. If there exist deficiencies on account of the subject transactions (which the targets vigorously deny) and if such disputed deficiencies were created by the negligence, intentional disregard, or fraud of the targets, *Code* §6653(a) and (b) provide an appropriate remedy with which to exact sufficient and suitable penalties. However, the existence of coal and territorial rights to the Allen process should serve to rule out criminal prosecution as a matter of law. Also, the government would be far better off in this case in the civil arena, where it is the taxpayers and not the government who must shoulder the proof burden on these extremely complex facts. Civil litigation would also be far more beneficial for the public fisc because the government could recognize (decontaminate) the transaction and refuse to give investors theft loss deductions under *Code* §165(e), which (investor theft loss deductions) would be the necessary consequence of a successful (albeit contrary to and unsupported *by* law) government criminal prosecution.

Recently there has been an explosion of tax shelter litigation, the first opinions (regarding which) are just now being handed down by the Courts. The one element common to all these cases is their adherence to the proposition laid down long ago in Isham, id., that a transaction will be respected and not ignored (shammed) so long as there exists some substance — however slim — supporting the relevant transaction.

The courts may not always allow the civil tax deduction or credit involved in tax shelter cases but even in the most questionable of recent tax shelter cases where tax avoidance is undoubtedly the purpose of the basic transaction, such transaction has not been ignored and the question of fraud, even civil fraud, has not been raised because the transaction involved (there) as here has some arguable independent economic purpose or significance, i.e., the transfer of coal subleases and/or territorial rights to the Allen process. Examples follow.

In the most recent tax shelter case, Smith v. Commissioner, 78 TC No. 26 (3-5-82) the Tax Court (Judge Nims) ruled in a case of first impression that losses sustained by an investor in a commodity (silver) tax shelter straddle transaction were not deductible. In the Smith, id straddle the taxpayers pursued a scheme of maintaining a balanced position in identical long and short silver futures merely to stagger economically offsetting gains and losses in different years. In Smith, id, the government took the primary litigating position that in a commodities tax straddle the first year's loss "leg" of the straddle had no independent economic significance but rather should be integrated with second year gain and recognized if at all only in the subsequent or gain year. Rev. Rul. 77-185, 1977-1 C.B. 48, Smith, supra, at 78-203. While the Tax Court ultimately concluded the Smiths' losses were not deductible because those losses were not incurred in a transaction entered into for profit as required by Code §165(c)(2), the Court refused to consider the Smiths' silver butterfly commodities straddle transaction a sham of no independent economic significance, even though as a practical matter no profit could ever have been made by the Smiths from the transaction. In summary, in Smith, supra, respondent was judicially denied permission to apply the step transaction doctrine to sham a transaction which the Tax Court found as an ultimate fact was incurred for one purpose — and one purpose only, — tax avoidance. Smith, supra, at 78-205. If Smith, id, cannot be shammed, how can the instant tax shelter models?

The instant investors (who bought valuable coal in place through a sublease and territorial rights to the Allen process through their R&D purchases) were involved in transactions with far more economic significance (and had conferred upon them benefits involving substantially more economic substance) than did those investors like Smith who purchased offsetting silver butterfly commodity futures contracts solely in hopes of achieving tax relief and nothing more. Whereas the silver butterflies did not exist apart from the anticipated tax benefits, the coal and territorial rights to the Allen process do. The Smith, supra straddle conferred ephemeral (as opposed to tangible) benefits on investors. By contrast, in the instant case tangible benefits were conferred. In the instant case a charge of sham cannot be sustained because it presents a far more legitimate and less suspect case of commercial and economic reality than did Smith, supra, which the Tax Court refused to ignore, in a civil context where the taxpayers had the burden of proof. If the government could not successfully defend a sham theory in Smith, id, under such circumstances how can it here prove sham beyond a reasonable doubt?

No opinion deals with the government's sham argument in tax shelter litigation more thoroughly than does Judge Hall's opinion in the now famous oil and gas (multiple deduction) shelter case of Brountas v. Commissioner, 73 T.C.

491 (1979).

In Brountas, id, promoters offered many investors large multiple tax writeoffs (through the Code §263(c) and Treas. Reg. §1.612-4(a) intangible drilling cost deduction) through an intricate maze of lease purchases and turnkey drilling agreements. In Brountas, id, in its brief the government stated "The gravamen of respondent's position is that petitioner's program was a tax gimmick and a fraud". Brountas, id, at p. 538. There respondent contended "that the true or economic deal was limited to the cash portion of the price; that the contingent 'note' portion was a matter of no economic import cynically added on at (the promoter's) behest * * * contrary to sound economic practice, and solely to swell the nominal price in order to generate a fictitious, large, front-end shelter in excess of cash investment" id at 539. Basically, the government in Brountas, id, alleged the precise sham, fraud and substance over form arguments that the proseoutor is making in the instant case.

Judge Hall rejected these arguments out of hand in spite of what the government called an abusive tax shelter scheme evident in Brountas, id. In Brountas, id, Judge Hall had before her the perfect case in which to disregard the notes or leverage. The Brountas, id, notes were nonrecourse notes 8) given for 60% of the turnkey cost (40% of the cost came from investor cash) exclusively to "hype" or inflate basis and the intangible drilling cost deduction. In fact, in Brountas, id, the Court found as fact a total of $52 million worth of nonrecourse notes leveraging the transaction were issued and that the anticipated total payments thereon, including interest and before discounting for present value was only approximately $9 million or less than one fifth the face amount of the notes! Nevertheless, Judge Hall held that

> "It is fair to say that the notes could only have had a market value when issued, which was a small fraction of their face amount. However, it is impossible for us to shrug off even $9 million as a sham of no commercial importance." id at 556.

So it is in the instant case that the significant cash and notes paid for the coal in place and methanol process which exceed the amount paid in Brountas, id, may not be disregarded (shrugged off) as a sham of no commercial importance. This being the case, the prosecution should, in all fairness cease its relentless and ill founded attack on these targets. Brountas, id, was a case which also involved the sinister "money circle" or "check loop". There, "operators borrowed the note portion of the total contract price from a bank, 'loaned' this money to CRC (the promoter) and, when the total contract price was received used 60% of this to repay the bank". id at 540. Judge Hall entirely disregarded and ignored the "loan" for tax purposes and yet still recognized the validity of the underlying investor nonrecourse notes as creating basis for the taxpayer. Judge Hall found that in spite of the above,

> the nonrecourse notes which the investors gave to the operators had economic significance and were a bona fide and bargained for part of the transactions. id at 540.

She found this even though the proceeds presumably lent in respect of the nonrecourse notes were money circle proceeds which returned immediately to the source and which had to be disregarded entirely for tax purposes. Accordingly, in Brountas, id, the money circle financing format was sufficient to boost investor basis as a matter of technical tax law. Brountas, id, is the classic tax shelter case where the nonrecourse notes (leverage) were suspect to say the least. Judge Hall heard witness testimony that (a) some operators hoped not only to cover their costs but earn a profit as well from the cash portion of the turnkey price and (b) the nonrecourse notes were shams added to the contracts solely for tax reasons. Even with this in mind Judge Hall concluded

> To be sure CRC (the promoter) structured those arrangements to provide tax shelter, and intended that the nonrecourse note would yield tax benefits to the investors. id at 545.

Nevertheless, Judge Hall held the note and related financing transaction had some substance and could not be disregarded as a sham. In Brountas, id, the court concluded

> We believe that respondent's determination of an addition to tax for fraud (civil fraud in that case) because of the alleged sham nature of these transaction is devoid of merit. * * * To be sure tax considerations played a dominant role in the structure which (the promoter) employed in its program, but tax planning is not fraud. Frank Lyon v. U.S., 435 US 561 (1978) (Emph. Supp.)

If the government could not prove civil fraud in Brountas, id, by clear and convincing evidence, how can it prove criminal fraud here beyond a reasonable doubt?

In another recent tax shelter case, Dillingham v. U.S., 48 AFTR 2d 81-5815 (W.D. Okla. 1981) Oklahoma's Western District Court held that in the classic leveraged oil and gas tax shelter partnership model, the nonrecourse note used to "hype" or increase tax basis and consequently the intangible drilling cost deduction, which note was payable only out of mineral production evidenced a valid debt. The Court like the Tax Court above specifically and totally repudiated the government's claim of sham. The Court went even further and held that even if the note was contingent and did not evidence true debt, it nonetheless was good evidence of deductibility of a separate kind, a Code §636 production payment, identical to the instant situation with Arapahoe - Dakota. In Dillingham, id, the Court as an alternative theory would permit deductibility even on a note presumed as a threshold matter to be too contingent and speculative to evidence true debt. In other words, it would permit a highly speculative and questionable note to increase tax basis and be a valid predicate for leveraged deductions. The Dillingham, id, lesson is that if there is mineral in the ground (or if an Allen type process exists) the transaction may not be treated nor the financing disregarded as a sham.

Recently the government attacked as a sham a purported sale of stock between husband and wife. Bowen v. Commissioner, 78 T.C. No. 5 (1982). There, wife sold her stock to husband on the installment basis. The installment payments were to be made over a 40 year period with a "balloon" payment due at the end of 40 years. Subsequently, the husband sold a portion of the shares purchased from his wife. In computing gain on the second sale the husband claimed an increased or stepped-up basis as a result of the interspousal purchase. The government determined deficiencies and a Code §6653(a) negligence penalty on account of the attempted and taxpayer designed basis step up.

In Bowen, id, respondent vigorously argued for judicial approval of the deficiency predicated upon the facts that 1) the interspousal sale was very suspect ab initio, 2) there were no valid nontax reasons for Mr. and Mrs. Bowen to enter into the transaction and 3) the terms and condition of the interspousal sale i.e., the artificial sales price and 40 year payment term were admittedly not arms' length nor reflective of true arm's length sales terms. In sum, respondent contended the interspousal sale "lacks the substance of a sale and therefore should not be treated as such". Bowen, id, at paragraph 78.5 P-H T.C. 78-41. The petitioners in Bowen, id, admittedly achieved deferral of gain without deferral of a basis boost. "Thus a subsequent resale produces proceeds without producing gain". id at 78-44.

The Bowen, id, court held that even under the above circumstances the interspousal sale was not and cannot fairly be considered, even for tax purposes, as a sham. The court would have held no sham under these circumstances even if the interspousal sales price was not an arm's length price but was admittedly less (or more) than fair market value. In this regard, the court held

> A sale for less than fair market value is still a sale. It may be a bargain sale, in which case the difference between fair market value may constitute, among others, compensation, a gift, or a dividend, depending on the circumstances, but it is nonetheless a sale to some extent. id at 78-44.

The court went on to hold

> Here, we are not convinced that the interspousal sale was for less than fair market value, but even if we were, the result would not change. (Emph. Supp.) at 78-44.

Since the court held "the Bowens' interspousal stock sale had sufficient substance to warrant respect for its form", the court entered decision for petitioners and redetermined no deficiency and no negligence penalty. It is submitted that in the instant case, where investor coal is in place and territorial rights to the Allen process belong to the investors, a sale to the investors is still a sale under the *Bowen, id*, rationale and so long as there is "a sale to some extent" (*Bowen, id*, at 78-44) there is "sufficient substance to warrant respect for its form". *Bowen, id*, at 78-45. If the government could not even make a civil negligence case in *Bowen, id*, where the taxpayer had the burden of proof, how in the world can it make a criminal case here where it must carry the burden under the elevated criminal proof standard?

In *Goldstein v. Commissioner*, 364 F.2d 734, 18 AFTR 2d 5328 (2d Cir. 1966) *aff'g* 44 T.C. 284 (1965), *cert. den.*, 385 U.S. 1005 (1967) the Second Circuit Court of Appeals refused to find a sham occurred where the taxpayer in the year she won the Irish Sweepstakes "borrowed" money to purchase government securities. The loans were fully collateralized by the government securities and required Mrs. Goldstein to pay a rate of interest on the loans exceeding the interest rate on the securities. In other words, Mrs. Goldstein "locked in", manufactured or guaranteed herself hoped for deductible loss by entering the transaction. The government argued and the Tax Court and the Court of Appeals held the taxpayer "entered into the Jersey City Bank and Royal State Bank transactions without any realistic expectation of economic profit and 'solely' in order to secure a large interest deduction in 1958 which could be deducted from her sweepstakes winnings in that year". 18 AFTR 2d p. 5332 and 5334.

Nevertheless, the Court of Appeals refused to call or even consider the transaction a "sham", even though it refused to grant the interest deductions as a matter of civil tax law. The court rejected the government's sham argument out of hand at 18 AFTR 2d 5330 by stating that if the transaction is structured or formatted correctly on paper and does not "return all the parties to the position from which they had started" the transaction may be defective or ineffective civilly to achieve its tax avoidance purpose but it may not be viewed as a sham. The court quite properly and observantly noted that a transaction need not be a sham to be ineffective as a tax avoidance device thereby differentiating between the sham transaction and the transaction which though "papered" correctly does not confer the desired civil tax benefit.

The distinction reached in Goldstein, id, should not be lost on the prosecution here. Where as here the paper is correct as a technical tax matter and the transaction does not "return all parties to the position from which they started" as did Clardy, supra, no criminal case can fairly be said to exist. The Court of Appeals in Goldstein, supra, stated quite clearly and precisely "we think it was error for the Tax Court to conclude that (the Goldstein) transactions were 'shams' which created no genuine indebtedness. Were this the only ground on which the decision reached below could be supported we would be compelled to reverse". 18 AFTR 2d pp. 5330 and 5331.

It is quite evident that under all the above cases the subject instant transactions cannot be ignored as shams, even though reasonable men may differ on the technical tax law implications of the transactions. It is therefore a question of the amount and not the existence of tax deductions which arises between the parties and resolution is exclusively a matter for consideration by civil courts.

### B. BOTH THE TAX LAW AND COMMERCIAL PRACTICE NOW RECOGNIZE AND FOR QUITE SOME TIME HAVE RECOGNIZED THE "MONEY CIRCLE" OR "CHECK LOOP" AS A VALID, LEGITIMATE AND CONVENTIONAL FINANCING METHOD. IN FACT, RECENT LEGISLATION NOT ONLY ENCOURAGES BUT GOES SO

FAR AS TO MAKE TAX AUDIT PROOF SOME "MONEY CIRCLES" OR "CHECK LOOPS".

As previously stated, the prosecutor's theory of criminality in this case is that the targets constructed and contrived an artificial "money circle" or "check loop" which purported to, but did not in fact, confer leverage on the investors for purposes of letting them boost their bases and avail themselves of large "up front" deductions. The prosecutor has offered to "walk away" from the case if the "sinister money circle" can be decontaminated or shown to be substantive or legal.

It is submitted that the money circle financing technique is legal, has substance and is now and has been for quite some time a legitimate, conventional and proper business as well as tax approved financing device or technique.

First, the term "money circle" should be defined. The prosecutor takes the position that under Clardy, supra, a money circle is a device in which a payment from the source of funds goes to and through a conduit and is almost simultaneously thereafter returned to the source. The prosecutor feels that in the money circle, the conduit has no independent means with which to pay the source (except for returning the source's funds to the source) so that the funds in question are not comingled with the conduit's funds but can easily be traced from the source to and through the conduit and back to the source. Further, the prosecutor feels that where the payment amount by the source can be in any arbitrary amount (only the blanks need to be filled in) the transaction or money circle is both transparent and prohibited. For all purposes we will use the prosecutor's definition arguendo.

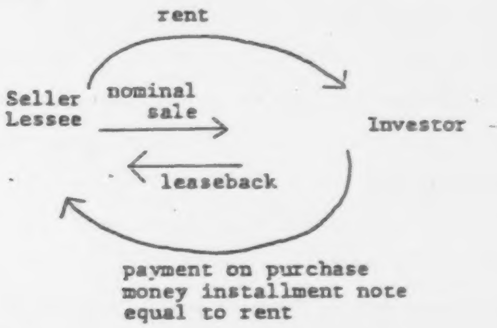
The prosecutor views the instant transaction as a classic example of a money circle. For purposes of this argument only, the targets will concede their transaction involved such a money circle. That it did is then both true (arguendo) and irrelevant. Such a money circle financing device is common to conventional, legitimate everyday business transactions, encouraged by the tax laws and specifically approved by Congress!

The money circle which is in the prosecutor's own words (and is therefore admittedly) the linchpin to the prosecution's case, and forms the sine que non to the decision to seek indictment is nothing more than one way to set up payments in a transaction. It is a legitimate financing vehicle and as previously discussed was judicially approved in Brountas, id.

In fact, the classical money circle is found in all purchase money situations and particularly in purchase money installment sale leaseback transactions. In such a case (purchase money installment sale leasebacks) a "seller" who desires to extract equity (or reduce or eliminate debt) on property he owns typically agrees to "sell" his property to a "purchaser" investor (nominal owner) who seeks nothing but tax relief. In the typical case the "sale" takes place on paper only - - the property always remains in the possession of the "seller" and possession is never acquired by the investor "purchaser". Most times the investor never even sees the property.

Simultaneous with the "sale" the investor leases the property back to the "seller" who then becomes a lessee for a monthly rental price which is exactly sufficient to permit the tax investor to amortize or reduce the debt created by the original purchase with each rental payment as an installment payment on the purchase money note. Tax "alchemy" (magic) is achieved. The tax investor who in actuality only purchased the tax benefits of the property (and not the property itself) without so much as having ever taken possession of the property (he is the nominal title holder in most cases but he need not even acquire formal title in some jurisdictions), has purchased a tax benefit and a tax benefit only, i.e., a tax deduction or tax credit associated with ownership of property, which in the practical sense he never owns. The "seller" never parts with use, possession or the benefits and burdens of ownership of the property (typically at the time of the transaction he cannot use or has already dissipated all tax benefits associated with ownership of the property and is then able to "get his equity out" of the property or reduce or eliminate his debt thereon by entering the transaction). All this is done through use of the money circle or check loop.

The government admittedly receives reduced tax revenues on account of this artificial transaction but may not criminally attack it because it is a widely recognized and legitimate financing technique even though it yields tax benefits and was set up in the first place for only tax avoidance reasons. Schematically the purchase money installment sale leaseback looks like this



The above transaction bears a striking resemblance to the target's tax shelter model. This is because it is identical to the target's model as a financing device. The targets did nothing exotic or innovative in structuring their financing device. They simply used a conventional and legitimate technique common to the most elementary sale leaseback transactions. The classical purchase money installment sale leaseback transaction is without question a money circle or check loop. The investor does not pay a penny on the purchase money installment note until and unless he is supplied funds by the "seller lessee" under the guise of a rental payment. The purchase money note is retired exclusively through traceable rentals received from the seller lessee. Accordingly, any price can be picked as the purchase price for the property so long as the rental payments accommodate that price by enabling the investor to amortize or pay down his purchase money installment loan with the "rental proceeds".

In some cases the government attacks the purchase price (and related tax benefits associated with ownership) in these transactions as being artificially high. *Estate of Franklin v. Commissioner*, 544 F.2d 1045, 38 AFTR 2d 76-6126 (9th Cir. 1976). In these cases it is not the existence but rather the amount of tax deductions and credits that become the point of contention. In some of these cases such as *Franklin*, *id*, the government prevails. In other cases even in the same court at about the same time the taxpayer prevails. *Hudspeth v. Commissioner*, 509 F.2d 1224, 35 AFTR 2d 75-674 (9th Cir. 1975).

However, in both *Franklin*, *supra*, as well as *Hudspeth*, *supra*, the money circle or check loop format for financing the sale leaseback transaction has gone unquestioned and remains unassailed. In both these cases the court and both parties have implicitly agreed to the inherent legality and regularity of the money circle or check loop as a financing device wherein "lease payments were [are] designed to approximate closely the principal and interest payments with the consequence that [with minor exceptions] no cash would cross between (purchaser) and (seller) until the balloon payment (10 years)." *Franklin*, *supra*, at 38 AFTR 2d 76-6165. In *Hudspeth*, *supra*, the court conceded that "Before they (the children) received the parents' check, no taxpayer had enough money in his account to cover his personal check." at 35 AFTR 2d 75—677. In spite of this, in *Hudspeth*, *supra*, the court held that children (whose parents made an intra-family land transfer) received title by *bona fide* sale, not gift. Accordingly, these children were entitled to tax deductions for interest on the purchase money installment loan made by their parents equal to the rental income received from those same parents.

Traditionally, lawyers sell and leaseback buildings (respectively to and from their children) to avoid taxes. Doctors effect family sale leasebacks of their equipment, veterinarians of their animal cages. All of these transactions have three elements in common with the subject target's transactions: 1) they involve the money circle 2) they are tax motivated and 3) they are legal. Corporations enter sale leasebacks on a much grander scale. Companies commonly sell and leaseback airplanes, oil rigs, office towers, in fact, you can be sure that if it can fairly be classified as property (either real or personal) and it can be sold and leased back that someone somewhere has already done it.

In fact, the Supreme Court has approved the classic tax motivated sale leaseback model (and reversed the judgment of the Eighth Circuit Court of Appeals) in the now famous case of Frank Lyon Co. v. U.S., 435 U.S. 561, 41 AFTR 2d 78-1142 (1978). In Lyon, id, the Supreme Court approved a complex money circle conduit almost identical with the instant money circle.

In Lyon, id, solely in order to circumvent federal banking regulations a state bank decided to purchase its new headquarters and principal banking facility building as follows. The bank would "sell" the unconstructed building piece by piece as it was constructed to Lyon, a company whose majority shareholder and board chairman coincidentally served on the bank's board of directors. Lyon would simultaneously leaseback to the bank the new facility (piece by piece) under a triple net lease with a 25 year primary term and options by the bank to extend the lease for eight additional five year terms. The lease period then could extend for a total of 65 years considering all the options. In addition, the bank had a repurchase option available to it to "reacquire" full ownership of the fully constructed building for a fifteen year period (years 11-25) by simply repaying all principal and interest compounded at 6% advanced by the first mortgage lender and Lyon (in essence the second mortgage lender). Throughout that 15 year period, Judge Stevens in his dissent stated "the economic relationship among the parties parallels exactly the normal relationship between an owner and two lenders, one secured by a first mortgage and the other by a second mortgage".[9] 41 AFTR 2d at 78-1152.

The bank obtained a permanent financing commitment from New York Life which Lyon "took over". The rent payable from the bank over the 25 year primary lease term equalled the principal and interest payments that would fully amortize the New York Life mortgage loan over the same period. At all times, the bank owned the underlying ground and Lyon paid ground rent to the bank for use of the land.

On audit of Lyon the government took the position that Lyon was not the owner of the building because the sale - leaseback transaction was a clear sham of no economic significance and amounted to nothing more than a disguised financing transaction in which Lyon was a mere conduit for transmission of proceeds (principal and interest) from the bank to the first mortgage lender. In *Lyon*, *id*, like *Clardy*, *supra* upon which the government relies in the instant case a "money circle" was utilized as the primary financing device. In *Lyon*, *supra*, rents from the bank paid to Lyon, the admitted conduit, were repaid by Lyon to the lender upon receipt by Lyon as mortgage payments. All payments were equal in amount. The government recognized and predicated its civil tax disallowance on this fact.

If no third party mortgage lender were involved in *Lyon*, *supra*, that case would be the classical purchase money installment sale - leaseback money circle, i.e., if the bank did not choose to use New York Life's mortgage money but instead used its own money to construct the building the rentals it paid would be immediately returned to it as installment payments by *Lyon* on the purchase money note. Needless to say, in *Lyon*, *supra*, the Supreme Court approved the transaction and all deductions taken in connection therewith as if Lyon (the conduit) were the true owner of the property all the time. The court entirely rejected the negative facts that rentals combined with the options were exactly sufficient to amortize the first mortgage loan and pay Lyon a 6% return on its cash invested and that at no time could Lyon make more than 6% compounded on its capital. Lyon was in actuality no more than a nominal title holder, conduit and second mortgage lender. How can the government in good faith predicate a criminal case on use of the same money circle recently approved by the Supreme Court in Lyon, id?

As if that were not enough, the Economic Recovery Tax Act of 1981 (ERTA) granted a tax audit proof means by which certain tax investors could obtain favorable sale-leaseback treatment using as a financing format the very money circle denominated in this case by the prosecutor as the foundation, cornerstone and essence of his case! ERTA Act §201 added to the Code, §168(f)(8), a "leveraged [10] lease" safeharbor. Provided its conditions are satisfied, Code §168(f)(8) insulates a transaction from audit and guarantees the transaction will be characterized as a lease for purposes of allowing the tax motivated investor (nominal lessor) to receive investment tax credit and ACRS deduction. It eliminates Lyon, supra, type litigation in certain cases. It is important to note that Code §168(f)(8) does not make the money circle legal in purchase money installment sale and leaseback transactions, that has always been legal! It does however provide a form which if used may not even be questioned.

In other words, it not only confirms the legality of the money circle but it makes the money circle audit proof in leveraged lease situations. While Code §168(f)(8) is effective for property placed in service after December 31, 1980, it demonstrates the continuing intent of Congress to encourage tax investors to use the money circle to finance property acquisition.

The legislative history of Code §168(f)(8) is very clear; it states inter alia

> If a transaction meets the above (safe harbor) requirements, the transaction will be treated as a lease and the parties of the transaction will be treated as lessor and lessee as stipulated in their agreement. The following factors will therefore not be taken into account in determining whether a transaction is a lease:
>
> (1) whether the lessor or lessee must take the tax benefits into account in order to make a profit from the transaction;
>
> (2) the fact that the lessee is the nominal owner of the property for state or local law purposes (e.g., has title to the property) and retains the burdens, benefits, and incidents of ownership (such as payment of taxes and maintenance charges with respect to the property);
>
> (3) whether or not a person other than the lessee may be able to use the property after the lease term;
>
> (4) the fact that the property may (or must) be bought or sold at the end of the lease term at a fixed or determinable price that is more or less than its fair market value at that time;
>
> (5) the fact that the lessee or related party has provided financing or has guaranteed financing for the transaction (other than for the lessor's minimum 10-percent investment); and
>
> (6) the obligation of any person is subject to any contingency or offset agreement.

House Bill on ERTA §211 1981, ____ CB ____, H.R. 4242.

Illustrating the above, let us hypothetically assume that a qualified investor at year end desires tax shelter and tax shelter only. Our hypothetical investor finds (directly or through a promoter-broker) an owner of property, i.e., equipment and arranges a paper transaction sale of the property to the investor in return for a purchase money installment note. The seller never parts with possession control or even legal title to the property. In fact, the seller always maintains all benefits and burdens of ownership. As mentioned, the sale is made on the installment basis and is financed entirely by the seller. The purchase price is artificially high. The nominal tax investor simultaneously "leases" the property back to the seller for no profit but only at a monthly rental sufficient to cover treaceable payments the nominal tax investor must make to the seller on the purchase money installment note. The investor cannot make any profit from the transaction apart from tax benefits. The investor has no cash other than the rent he receives from and must pay to the seller. In fact, the seller merely debits and credits his books showing counterbalancing rent payments and note payments during each month. The seller can buy the property back at the end of the lease for one dollar.

Given the above, the money circle not only achieves its tax avoidance goal but may not even be audited! Ford, General Motors, The City of Philadelphia and other corporate and governmental giants have recently used this very money circle without the slightest problem. How does such use of the money circle technically differ from the use made of that same financing vehicle by the targets? It is submitted that it does not. The targets do not claim Code §168(f)(8) safeharbor and admit they can be civilly audited. However, the notion that they should be prosecuted for using a classical and perfectly legitimate financing technique approved by the Supreme Court, the Tax Court and various district courts is faulty.

The government should not seek indictment in a case where its sole and admitted basis of criminality is nothing more than a common, approved and legislatively encouraged financing device or technique.

## CONCLUSION

The time has now and at long last 11) come for the government to examine its theory of culpability under the cold light of commercial reality, long standing business practice and technical tax law considerations. The government may not like the complex structure used in the instant case nor the fact that it has generated large front end civil tax deductions for many investors but whatever the targets have done it is not criminal. The targets are not seeking the tax citizenship award nor a good conduct citation from the Treasury Department but neither their model nor their acts constitute a criminal offense or badge of fraud and the government should preserve its prosecutions and resources for cases factually resembling Clardy, supra and not Lyon, supra. There is a substantial difference between the two. The fact that here investors purchased tangible items and there exists more than a reversible paper audit trail compels the conclusion that the government should not seek indictment nor cause the targets to suffer any more trauma, emotional distress and embarrassment than they have already borne. Notions of fairness and the prospect of this case being the subject of a pretrial judgment of acquittal on the above grounds should convince the prosecutor to do as he has pledged when shown that the money circle simply is not criminal.

It took a great deal of time and money to develop this case. But that in and of itself does not justify its continuation. Analysis of the facts gathered at so great a cost to both the government and the targets amply demonstrates further activity would only be ill advised, ill conceived and contrary to law. There must come a time when reason and good sense prevail over the incredible passions that have emerged heretofore.

It is submitted that time is now. Invectives on both sides have shed more heat than light on the real issue and perhaps are responsible for an investigation which it now appears has gotten out of hand. It is now time to reflect on the real issues in this case, which upon such reflection simply and clearly do not warrant criminal prosecution.

For all these reasons it is submitted that the prosecution should cease and the targets, broken victims of this ugly inquiry be given the opportunity to repair what remains of their lives on a social, financial and emotional level. If O'Donnell took the tax law as he found it and structured a transaction within its confines or even arguably within those confines he may be called upon to answer for what he did in a number of civil arenas but not before a criminal jury. The purpose of this proceeding should not be (as we suspect it may be) to stop other practicioners from structuring legal tax avoidance devices. This proceeding is far too serious for that kind of purpose and this proceeding should not be used to chill legal expression, creativity or structures within the boundaries of law that are unappealing to Treasury.

Respectfully submitted,

GROSSMAN AND FLASK, P.C.

By Robert D. Grossman Jr.
ROBERT D. GROSSMAN, JR.

RDG:mtb

## FOOTNOTES

1) As used herein throughout the term "tax shelter investments" or "tax shelters" shall mean those investment transactions and opportunities in which the excess of investor non-cash deductions (i.e., depreciation, lease payments, R&D deductions, etc.) over cash non-deductions (i.e., principal payments or loan principal amortization) creates or yields a loss for tax purposes against which an investor can match unrelated income, i.e., wage, dividend or interest income. Frequently, these investments involve "leverage" i.e., loans increasing basis to permit deductible payments to be made and deductions taken in an amount in excess of the cash actually invested or contributed by the investor.

2) In *Firestone Tire & Rubber Co. v. Justice Dept.*, CA No. 80-2616 ____ F. Supp. ____ (DCDC 1981) Judge Oberdorfer held such prosecution memorandums constituted attorney work product, the disclosure of which would chill frank prosecutional evaluations of tax cases and are accordingly exempt from F.O.I.A. disclosure.

3) See footnote 1 above.

4) Any potential issue as to whether *Code* §465 limits investor losses for tax purposes in the instant case is mute because as the prosecutor readily admits all investor nonrecourse notes were in fact reduced to cash and such cash was in fact paid over to the various promoter corporations. The receipt of this cash by the various promoter corporations is itself for some reason a source of irritation to the prosecutor.

5) Internal Revenue Code (hereinafter *Code*) §636 specifically states a production payment carved out of mineral property is treated as a mortgage loan. Accordingly, P & J's purchase of investor coal production was denominated as a loan in accordance with the above *Code* section.

6) *Code* §461(g) requires such prepaid interest to be capitalized and ratably deducted over the period of the loan. This *Code* section was added by §208(a) of the Tax Reform Act of 1976.

7) See footnote 1 above.

8) Nonrecourse loans are loans for and under which the holder has no personal recourse against the borrower. The lenders' sole payment remedy may be to foreclose against the pledged property (realty) or receive payment from production (oil and gas) but in no event may the lender attack and collect from the borrowers' personal statement.

9) In a footnote to this quotation Justice Stevens cited *Rosenberg & Weinstein, Sale - Leaseback: An Analysis of These Transactions After the Lyon Decision, 45 Journal of Taxation 146, 149 (Sept. 1976)* where the authors concluded "where a fixed price as in Frank Lyon Company, is designated merely to provide the lessor with a predetermined fixed return, the substantive bargain is more akin to the relationship between a debtor and creditor than between a lessor and lessee."

10) The term "Leverage" here is identical to the leverage used in the instant transactions, i.e., a loan made to tax investor for the exclusive purpose of boosting prices.

11) Two Grand Juries have now heard this case.

EXHIBIT

May 28, 1982

United States Department of Justice
Tax Division
Criminal Section
10th and Pennsylvania Avenue, N.W.
Room 4611
Washington, D.C. 20530
Attn: Steven L. Snyder

Re: Declan J. O'Donnell -
Denver Grand Jury

Dear Mr. Snyder:

On May 12, 1982 I wrote you a letter and attached a Memorandum of Laws regarding my above styled client, Declan J. O'Donnell. As I have not heard from you at all regarding your views and those of the Department of Justice on the merits of my Memorandum of Laws and because the next scheduled meeting of the Denver Grand Jury is the end of June, 1982, I would respectfully request an opportunity to meet with you, Mr. Kryza, Mr. Murray and the Honorable William French Smith, Attorney General of the United States in hopes that we could discuss the legal and tax issues raised in my May 12, 1982 submission as soon as possible and prior to the time that you go to the Grand Jury for an indictment of my client, Declan J. O'Donnell.

Accordingly, I would be extremely grateful if you would be kind enough to see if we could meet at your mutual convenience and in the near future so that I may orally outline our position to you and attempt to persuade you that it would be a grave mistake and enormously expensive and wasteful for you to seek an indictment against my client in connection with this matter.

I can assure you that I have the utmost respect for the Department of Justice and in an attempt to economize on your valuable time and that of your supervisors ask that we meet for as short a period of time as possible in this connection. In addition, I would be available at any time throughout that discussion to answer whatever questions you or your supervisors who may not be as familiar with this case as you are may have concerning my submission to you which may not have been answered in the submission. I genuinely feel that a criminal trial in this case would be an enormous mistake and one which could be avoided along with the time, effort and energy which would necessarily have to be expended by both sides if you will grant me a short meeting with you at your convenience.

In this regard, I will be available at any time and from time to time to come to your office to meet with you for the purposes discussed above and I can assure you that your granting me an hour or so would be extremely productive and worthwhile for all parties.

I have been apprised by you that you have taken your case to your supervisors and have received permission to prosecute this case to conclusion. I would only ask for a short meeting to attempt to persuade you and your supervisors of the merits of our position so that we could be given some time, albeit not equal time, to attempt to persuade the Department of Justice of the merits of the targets' arguments. I would hope that what I ask in this letter is not cumbersome or burdensome but that you will grant me the time to make my presentation to you in what I deem to be the most important single matter to which I have ever devoted my attention in my years as an attorney both on behalf of and opposing the United States government.

I understand that your instant investigation constitutes one of the largest, if not the largest, of its type in the history of the Department and I would think for that reason those who administer the Department of Justice would be interested to hear the targets' arguments which persuade me that as a legal matter there is no criminal case which can conceivably be made in light of the instant facts and law.

Please accept my appreciation on behalf of my client for your consideration of this letter and hopefully for whatever meeting we might have to discuss my Memorandum and thoughts regarding this case. I can assure you that it will be time well spent. Because the consequences of a returned indictment are so severe and devastating, it would seem only just to permit us one last chance to convince you that there has been no wrongdoing by my client. In the past, I have been granted such pre-indictment conferences by the Assistant United States Attorneys in matters of considerably less consequence.

Very truly yours,

GROSSMAN AND FLASK, P.C.

By____________________
ROBERT D. GROSSMAN, JR.

RDG:mtb

cc: The Honorable William French Smith,
Attorney General

John F. Murray,
Acting Assistant Attorney General,
Tax Division

Stanley E. Krysa,
Chief of the Criminal Section

D. J. O'Donnell

EXHIBIT 3

Tax Division

RECEIVED
GROSSMAN & FLASK
2020 K St., N.W.
Suite 420
Washington, D.C. 20006
JUN 14 1982

June 10, 1982

Washington, D.C. 20530

GLA:SFK:SLSnyder:kaw
5-13-2879
8020354

Robert D. Grossman, Jr., Esquire
Grossman and Flask, P.C.
Eighth Floor
1101 14th Street, N.W.
Washington, D.C. 20005

Re: Declan J. O'Donnell
Denver, Colorado

Dear Mr. Grossman:

Reference is made to your letter dated May 12, 1982 and the accompanying memoranda of law in which you request that you be contacted of the memorandum's factual representations were not "entirely accurate." Please be advised that Mr. Snyder and Mr. Blondin believe that the facts as represented in the memroanda are not accurate, indeed numerous material facts are omitted. Further, your attribution of certain statements to Mr. Snyder is not accurate to Mr. Snyder's recollection. Lastly, Mr. Snyder and Mr. Blondin reject your analysis and your interpretation of the cases relied upon, en toto.

Sincerely yours,

GLENN L. ARCHER, JR.
Assistant Attorney General
Tax Division

By: Stanley F. Krysa
STANLEY F. KRYSA
Chief, Criminal Section

EXHIBIT 4

July 14, 1982

United States
Department of Justice
Tax Division
Criminal Section
10th & Pennsylvania Ave., N. W.
Washington, D. C. 20530

Attn: Stanley F. Krysa,
Chief, Criminal
Section, Tax Division

Re: Declan J. O'Donnell, Denver, Colorado
Grand Jury

Dear Mr. Kryse:

On July 1, 1982 I attended a conference at the Department of Justice with prosecutors Thomas Blondin and Steven Snyder. On June 17, 1982 I was purportedly sent a letter notice of conference. However, that letter was improperly addressed and accordingly when the letter was returned to Mr. Blondin he called me and set up by phone our July 1, 1982 conference. The meeting was scheduled for July 1, 1982 at 10 A.M. At that time, Mr. Blondin and Mr. Synder asked if I had any objection to their bringing into the room to confer with us a summer intern. I indicated that I had an objection to her (or any other unrelated party) attending the conference because of the seriousness of the charges, the confidential nature of what was going to be discussed and the fact that no indictment has as yet been returned and the Rules of the Grand Jury would prohibit disclosure. The prosecutors acceded to my wishes and the summer intern did not attend the conference.

Thereafter, there was brought into the room an attorney, Jaret Scharf, who Mr. Blondin and Mr. Synder represented was a Reviewer with the Criminal Section. The prosecutors stated that Mr. Scharf may or may not be the final Reviewer for the Criminal Section in this matter. During our conference, I basically addressed myself to Mr. Scharf, knowing I could not change the minds of the prosecutors (who have committed so much time and expense to the cause of prosecution in this matter), but I had hoped to convince an impartial superior of the prosecutors to take an objective look at all the facts and circumstances.

We proceeded to have our conference for approximately two hours and twenty eight minutes. The notice of conference (which was given to me on July 1, 1982 by Mr. Blondin) stated that I am entitled to only one such conference and that I should prepare to present at that conference all arguments and documentary material (in triplicate) which I wished the government to consider. Messrs. Blondin and Synder stated to me that Mr. Scharf, who apparently has an LLM in taxation from New York University, was there in his capacity as a Reviewer for your section because of the importance of the conference and because we were to address both criminal as well as technical tax issues.

Upon my return to the office and after a few days reflection, I began to wonder whether Mr. Scharf was indeed a Reviewer for your section as was directly represented to me by the prosecutors. Transmitted herewith is a copy of page 39,968 of the current Prentice-Hall list of Reviewers for the Criminal Section. Your name appears at the top of the list as Chief of the Criminal Section and my former associate at the Office of Chief Counsel, Internal Revenue Service, Joseph W. Salus's name appears at the bottom of the list as a Reviewer. As you can see, the list does not contain the name of Jaret Scharf. In addition, Mr. Blondin represented to Richard Slivka (attorney for another target in this case) that Mr. Scharf was indeed not a Reviewer for your section. Apparently, the prosecutors merely told me that he was to induce me to believe my case was being objectively reviewed when in fact it was not.

Accordingly, I am writing to ask you directly whether Mr. Sharf is a Reviewer as was represented to me by Messrs. Blondin and Snyder with the agreement of Mr. Scharf (and Mr. Slivka was being deceived) or whether I was being deliberately deceived on July 1, 1982 by the two prosecutors and Mr. Scharf.

If Mr. Scharf is a Reviewer, contrary to the attached Prentice-Hall personnel list and Mr. Blondin's representation to Mr. Slivka, I would appreciate knowing that very much.

If, on the other hand, I was deliberately and gratuitously being deceived by the prosecutors and Mr. Scharf as to Mr. Scharf's status in your section. I would also greatly appreciate knowing that. In the latter case, I would respectfully request that the prosecutors be removed from this case because their conduct in deliberately deceiving counsel contravenes both the Code of Professional Responsibility (DR 1-102(A)(4)) as well as the standards of conduct for your office.

In the event that I was the victim of a deliberate deception perpetrated by members of your office on this most sober of occasions and in their performance of the official duties, I wish to express my revulsion as a member of the Bar, a citizen of the United States and a taxpayer. I would hope and I trust that yours is an office whose standards of conduct would not only conform to but would exceed those of the general community for integrity and candor. In the event that I was the unwitting victim of the prosecutors' deliberate deception designed to impair my advice to my client (at the conference we seriously discussed the possibility of presenting my client to testify before the Grand Jury without immunity based on the prosecutors' representations that such appearance may convince them not to seek indictment against my client) or to embarass me, I would ask that you personally review the matter and take the appropriate steps which obviously would be to remove any prosecutor who would intentionally deceive a fellow member of the bar in connection with an extremely serious and sensitive matter.

I wrote you on May 12, 1982 regarding this case and supplied you with a memorandum of laws containing my entire reasoning and explanation of why my client is not culpable of any deceit or fraud as the prosecutors have alleged. In the event the conduct of the prosecutors has somehow dropped to the level of the conduct alleged in their charges against my client, I would suggest that they are not fit to continue in this matter.

I would very much appreciate a response to my question regarding the status of Mr. Scharf and in the event that a fraud or deception has been perpetrated on me, I request that you take prompt and immediate action to attempt to repair the damage that has been done to your office by that conduct. Such conduct can only serve to undermine the integrity of your office. Also attached is a copy of Mr. Snyder's July 14, 1982 letter which continues to imply this case is under review by superiors. The letter was signed for you by Mr. Blondin.

Very truly yours,

GROSSMAN & FLASK, P.C.

By
ROBERT D. GROSSMAN, JR.

(Enclosures 2)
cc: Steven Snyder
Thomas Blondin
Declan O'Donnell
William Kilpatrick
Richard Slivka
RDG/cjt

EXHIBIT 5

Tax Division

Washington, D.C. 20530

August 13, 1982

RECEIVED
GROSSMAN & FLASK
2020 K St., N.W.
Suite 420
Washington, D. C. 20006
AUG 16 1982

SFK:RACimino:ehz
5-13-2879
B020354

Robert D. Grossman, Jr., Esquire
Grossman and Flask, P.C.
Eighth Floor
1101 14th Street, N.W.
Washington, D.C. 20005

Re: Grand Jury
Declan J. O'Donnell
Denver, Colorado

Dear Mr. Grossman:

This is in response to your letter dated July 14, 1982. With regard to your question about Mr. Jared Scharf's position in the Criminal Section, this is to advise you that Mr. Scharf is an acting reviewer. He has assumed that position and its responsibilities on or about March 1, 1982, and has acted in that capacity on prior occasions. As Chief of the Criminal Section, I was both aware and approved of the selection of Mr. Scharf as a reviewer in this case.

Messrs. Blondin and Snyder advise me that Mr. Scharf was introduced to you as an acting reviewer and that you are mistaken in claiming they misled you as to his status. Moreover, the copy of Prentice Hall that you refer to is no longer accurate due to changes in personnel. With regard to your comments about these two prosecutors trying to deceive you, I wish to advise you that this office has a high regard for both their integrity and candor. I have satisfied myself that your concerns are unfounded.

Sincerely yours,

Stanley F. Krysa

STANLEY F. KRYSA
Chief, Criminal Section
Tax Division

cc: Office of Professional Responsibility
Mr. Blondin
Mr. Snyder

U.S. Department of Justice
Tax Division

EXHIBIT 6

EIVED
GRO[illegible] & FLASK
2020 K St., N.W.
Suite 420
Washington, D.C. 20006

JUL 15 1982

FK:SLSnyder:kaw
2879
54

Washington, D.C. 20530

July 14, 1982

t D. Grossman, Jr., Esquire
man and Flask, P.C.
h Floor
14th Street, N.W.
ngton, D.C. 20005

Re: Declan J. O'Donnell
Denver, Colorado

Mr. Grossman:

Reference is made to your letter dated July 2, 1982,
rning the appearance of Declan J. O'Donnell before the
jury. First, I can not "give" Mr. O'Donnell an hour,
ime is not mine to give, it is the grand jury's. I
ipate they will extend to Mr. O'Donnell sufficient time
ke any point he desires. Secondly, I did not inform
hat "I would not interupt Mr. O'Donnell," rather I
med you that it is not my policy to interrupt a target
presenting his views, providing the testimony is
ant to the issues. Further, as to your comment that I
be given a reasonable period of time within which to
-examine Mr. O'Donnell exclusively concerning matters
l in his direct testimony," the government intends to
on Mr. O'Donnell concerning any and all issues relevant
e case. Mr. O'Donnell can answer or not answer any
ons as he chooses. Lastly, your observation that we
not seek to indict Mr. O'Donnell if you produced a tax
to state that there is unsettled controversey over
n issues is an absolute mischaracterization of what we
med you. As you must certainly recall we informed you
uch evidence could cause our superiors to hestitate on
luating the case, but you hardly received any guarantee
-prosecution.

Sincerely yours,

STANLEY F. KRYSA
Chief, Criminal Section
Tax Division

By:

Thomas Blondin
Trial Attorney

EXHIBIT 8

FEDERAL GRAND JURY

FOR THE DISTRICT OF COLORADO

81-2

IN THE MATTER OF A )
)
SPECIAL INVESTIGATION )

TESTIMONY OF

DECLAN J. O'DONNELL

(MORNING SESSION)

C-192 United States Courthouse
1929 Stout Street
Denver, Colorado 80294
Monday, July 19, 1982

The above-entitled matter came on for hearing before the Federal Grand Jury at the hour of 10:35 A.M.

APPEARANCES

| | |
|---|---|
| For the United States Government | STEVEN L. SNYDER<br>Special Attorney<br>Department of Justice<br>Washington, D.C. |

## STATEMENT OF WILLIAM C. WALLER, JR., ESQ., WALLER, MARK & ALLEN, P.C., DENVER, CO, ACCOMPANIED BY DENNIS MARK

Mr. **Waller**. Thank you, Senator Grassley.

Mr. Chairman, Senator Armstrong, I appreciate the opportunity to appear here today, and I thank the subcommittee for conducting these hearings and looking into the situation that has been demonstrated dramatically by the *Kilpatrick* case and the *Omni International* case; although, I think these cases are not necessarily isolated cases, and I think that what this subcommittee will eventually find is that there are certain patterns, that there are certain problems here that a subcommittee should take into consideration, and that there are specific actions that Congress can take in order to rectify the problems that do exist and to prevent future examples of these types of wrongdoings and abuse.

I have submitted a prepared statement, but for the purposes of this testimony I would like to depart from that statement and summarize for you what I believe are the most important things for the committee to take into consideration and to make a few observations that I think might be the most important and not repetitive of some of the other comments that have been made previously and that will be made later during the course of these hearings.

My name is William C. Waller, Jr., and I am a shareholder and director of the law firm of Waller, Mark & Allen in Denver, CO. I received my undergraduate degree from the U.S. Air Force Academy in Colorado Springs, CO, and I received my law degree from Cornell University in Ithaca, NY.

During the time that I was in the Air Force, I was a special agent with the Office of Special Investigations, and during the course of that period of time I conducted specialized criminal investigations and testified as a result of those investigations on behalf of the Government.

From August 1981 until the present time I have represented Mr. Kilpatrick and his company United Financial Operations during the course of these proceedings. I represented Mr. Kilpatrick during the trial before Judge Winner and in the posttrial sessions at the conclusion of which Judge Winner granted our motion for a new trial. I also represented Mr. Kilpatrick during the course of the proceedings in front of Judge Kane, which led to the original dismissal of the first 26 counts of the indictment against him and ultimately resulted in the dismissal of the entire indictment because of prosecutorial misconduct that occurred during the course of this case.

I have with me today Dennis Mark, one of my partners, who has argued the case which is currently pending in the Tenth Circuit Court of Appeals, and during the course of questions and answers I would ask Mr. Mark to join me at the table so that he could answer any questions that fall into the area of the case that he is primarily responsible for.

With respect to several items that I think are important for this subcommittee to understand, the grand jury process is an extremely important process in our criminal justice system. It has been a part of the English common law system since the Magna Carta. The whole concept of the grand jury is that an independent group of citizens will review evidence for or against any citizen before the Government can bring criminal charges against that citizen.

If the grand jury is going to function as it must function according to our constitutional system of government, which requires a grand jury indictment in any felony case, the independence of that grand jury must be maintained.

Now, the way we have attempted to assure that independence is that we have established specific rules that govern the actions of the Federal prosecutors before the grand jury, so that we can be assured anytime there is an indictment brought down that the grand jury, in its independent collective wisdom, has decided there is probable cause to believe that a felony crime has been committed.

The problem that we have is when the prosecutors, who do not appreciate the role of the grand jury and who view it as an inefficient or inconvenient mechanism, undermine by their own actions the independence of the grand jury.

Now, as a criminal defense lawyer I have often heard prosecutors say that the grand jury process is really more of a rubber stamp. I have oftentimes heard prosecutors say they can get a grand jury to indict a ham sandwich if they want to. That attitude indicates that the prosecutors do not adequately appreciate the role of the grand jury.

An additional danger of undermining the independence of the grand jury is the fact that the grand jury, because it is a group of independent citizens, is almost a fourth arm of Government, it is a quasi-judicial arm of Government, and it has been given extremely broad powers to help it carry out its job. It can subpoena witnesses from all around the world, it can require the production of documents from all around the world, it can investigate whatever it wants to investigate, it can indict if it decides there is probable cause for doing it.

Congress, at the same time, has put some very tough limitations on the powers of the Federal agencies in carrying out their functions. If the Federal agents or the prosecutors who are conducting the grand jury desire, they can get around the limitations that have been put on the Federal agencies by Congress by using the powers of the grand jury improperly to do things that they have been prevented from doing in the normal course of their investigation. I think that is one of the issues that is highlighted by this particular case.

The next issue that I think is important is the entire concept of the secrecy of the grand jury proceedings. In this case, as Mr. Kilpatrick and Mr. Grossman alluded to, secrecy of the proceedings are extremely important, because oftentimes the grand jury or theoretically the grand jury should undertake investigations, and if they decide there is no probable cause then it would have been tremendously damaging to the reputation of innocent individuals if it had been generally circulated or known that those individuals were being investigated by a grand jury.

At the same time, witnesses who are called before the grand jury may be subject to intimidation or fear if it is generally known that those witnesses had in fact testified. In this case, without the knowledge of the U.S. attorney in Colorado, letters were literally sent all over the country to customers of Mr. Kilpatrick and clients of Mr. O'Donnell and others, which indicated specifically that these individuals were being investigated by a Federal grand jury. You can imagine the effect that such letters would have on the clients and customers of a company, when they have gone to these individuals for most important business.

The third point that I think needs to be emphasized during the course of these proceedings is the general attitude of the Government during the course of the criminal proceedings, the grand jury proceedings, as well as the attitude of the Government since that time.

Now, I don't have to rephrase or recharacterize or restate what Judge Winner and Judge Kane have already said about their observations regarding the arrogance and the flip attitudes of the prosecutors and the IRS agents involved in this case; but I would like to point out a problem that concerns me most as an ex-Federal criminal investigator myself. One is the hesitancy of the Federal Government in this case to acknowledge the problems in the case.

You have two Federal district court judges who have never made the types of findings they made in this case—Judge Winner in his entire career, and Judge Kane in his career—who obviously and very strongly worded opinions, made specific findings of what they felt were wrongdoing, and yet you still have a Department of Justice which is defensive, which has drawn the wagons around the IRS and the Department of Justice, refusing even to acknowledge that some of the problems that occurred in this case were very serious problems.

The *Omni International* case that we heard testimony about yesterday is a second example, where Judge Black, who is ex-U.S. attorney himself and a college professor, wrote an opinion where it was clear that he was very upset and concerned about even having been put in a position of having to write the opinion; and yet, from my understanding and the newspaper articles I have read, we have the same attitude from the IRS and the Department of Justice that circle the wagons and protect our own.

I have been advised by the powers that be at the Department of Justice that the Office of Professional Responsibility would be investigating this particular case. I have since been advised by the same powers that the Office of Professional Responsibility did in fact conduct an investigation and thoroughly cleared all of the prosecutors involved in this particular case.

Now, I don't want to get involved in a situation of namecalling, and I don't think guilt or innocence is a question here; but I have the same question Judge Winner and Mr. Grossman have: If they in fact conducted a thorough investigation, why wasn't I called? Why wasn't Judge Winner called or Judge Kane called to testify? How in the world could you conduct a thorough investigation when you didn't talk to the court reporters or the clerks who witnessed and observed and ultimately testified to the wrongdoing that was involved?

When I addressed those questions to the Department of Justice officials who I know and have access to, they tell me that the Office of Professional Responsibility is a very top-secret-type organization, and they don't have access to those proceedings, they had not testified for those proceedings, and they don't know exactly what the basis of the findings were.

In substance, I think we see an attitude that displays an absolute unwillingness to recognize that there must be problems in these particular cases. And what concerns me is, if that is the general attitude, there is a strong likelihood that those type of problems may be widespread or are likely to occur again.

Next, I think it is very important for this subcommittee, as the oversight of the IRS, to take into consideration something that I have observed for a long time as a criminal defense lawyer in these types of tax cases: The IRS has a two-pronged function. One function is civil in nature; it is supposed to levy and collect taxes. The Federal income tax laws are themselves very complex. It is human nature that no one likes to pay taxes; no one wants to pay any more taxes than necessary. And you have a very difficult job for the IRS to perform, the assessment and collection of those taxes. We all recognize that, but we all recognize that unfortunately it is a necessary function.

At the same time, the IRS has a criminal investigation division that is responsible for criminal investigations. What concerns me is that the Congress has put certain very strict limitations on the civil functions or the civil side of the IRS to ensure that the citizens of the country aren't routinely harassed or intimidated, because we all recognize the power of the IRS and we all recognize the intimidation of the IRS when you are talking about an individual citizen.

So, Congress, in recognizing that, has attempted to say, "You can collect taxes, but here are certain limitations on how you can go about doing it."

The IRS bureaucracy is no different than any other; it has limited resources to carry out a very big job. What concerns me is that oftentimes the criminal side of the IRS function is subjugated to the civil side of the IRS. The civil side desires to collect as many taxes as it can. In cases like the *Kilpatrick* case, the "flagship case," what concerns me is that when they come up with a program like the Abusive Tax Shelter Program in order to collect more taxes, they can focus on a particular tax shelter, and in spite of evidence that you are dealing with very complex areas of the law that could find themselves worked out in civil courts, it is very tempting to take a case like this and make it a criminal case, and attempt to use that criminal case to intimidate people who are bona fide taxpayers and who are attempting to take advantage of the tax laws in a bona fide manner.

The next question that I think this subcommittee needs to address itself to, and part of the seriousness of it in both the *Omni* case and the *Kilpatrick* case, the cost of the investigation is almost impossible to imagine.

Mr. Kilpatrick has indicated that the combined defense costs of this case was something like $6 million. In the *Omni* case, which took place in Baltimore, in reviewing that file I determined that there are over six major law firms involved in that case. The proceedings took place over a 2-year period of time. Experts who traveled all over the country in order to run down watermarks on paper, in order to gather evidence to prove in court that the prosecutor and IRS agents had been lying, must have undoubtedly cost millions of dollars. My question is: How many people can afford to carry on that type of investigation of the investigators?

One practical aspect of this case from the trenches, so to speak, is that it may occur to the committee, "Are we talking about two isolated examples? Why don't we have more cases or more opinions like the Omni opinion or the Kilpatrick opinion?"

As a criminal defense lawyer I will tell you that the law is very, very difficult when a criminal defendant is attempting to gather evidence to prove wrongdoing during the course of the grand jury investigations or the investigations of the clients. There is a presumption that what the Government has done is correct, and you usually cannot get access to any of these materials during a meaningful stage in the proceedings in order to allow you to do that. It is only upon an overwhelming showing that there is likely to have been misconduct that allows you to get that information.

I think, and as I am going to summarize here and suggest some specific things that this subcommittee could look at, that it would be very possible to turn over information to defendants under provisions that would protect the secrecy of the grand jury proceedings and at the same time allow defendants to get access to this information at a meaningful time in the proceedings.

With that background in mind—and obviously we can go into some more in questions—there are some specific proposals that I think this subcommittee should seriously consider:

First, I believe that Congress should enact the proposed Grand Jury Reform Act, which is currently pending in the House as H.R. 1407, and Senate bill 284. That bill includes several provisions, but one of which I think you will get testimony on later includes the right of witnesses before the grand jury to have counsel present with them at the time of the proceedings. The current arrangement is very bulky and time consuming and serves no useful purpose, in my mind. Seventeen States have adopted reforms like this and, as Judge Winner testified yesterday, Colorado being one of them, apparently there are no real problems imagined or otherwise with this procedure.

Second, the Tax Division of the Department of Justice should be given adequate resources to have qualified tax lawyers responsible for reviewing and overseeing the criminal justice procedure in the area of tax cases. It is ridiculous to talk about these complex tax cases being prosecuted by attorneys who are themselves not very aware of and knowledgeable of the tax laws.

Third, the administration's proposed legislation to overrule the decision in *Baggot* and *Sells*, which are companion Supreme Court decisions basically reemphasizing the fact that the criminal justice system, the grand jury, is to be used only for criminal purposes and not to gather information in the civil setting, should be voted down. That legislation is apparently pending as Senate bill 1676.

Next, Congress should enact legislation or consider legislation to overrule an overbroad interpretation, in my opinion, of the recent Supreme Court decision in *United States* v. *Mechanik*. It is absolutely essential that, if there is wrongdoing discovered, that the district courts be kept with the power to provide adequate remedies, to punish the Government for their wrongdoing, and to keep it from happening again.

Next, Congress should enact legislation to modify the Jencks Act, title 18, United States Code, section 3500. The Jencks Act currently provides that witness statements and information about previous statements taken from witnesses need only be given to defense counsel at the conclusion of the witness' testimony. There is no reason, and it is often the policy in many U.S. attorney offices around the country, for that material to be withheld that long. That material should be provided at the time regular discovery is done in a criminal case, and I would encourage Congress to consider modifying the Jencks Act for that purpose.

I think Congress should enact legislation overturning the judicial precedents which make it so difficult for defense counsel to get access to the investigative material and the grand jury material. I think it would be very possible, upon a threshold showing a possibility of wrongdoing, or even a likelihood of wrongdoing, that the defense counsel should be given access to these grand jury transcripts. If the Government objects to that—and it could be subject to secrecy orders which are often given to defense counsel—if the Government objects, a motion could be made for the Government that the court review that in camera for specific reasons, and the court could review those in camera before making those available to defense counsel.

Finally, I think that this oversight subcommittee—and this is a long-term project, perhaps—should seriously examine this dual role of the IRS in both civil and criminal settings. I think the temptation is too great for the civil function or the civil purposes to slosh over onto the criminal side. This subcommittee may want to consider removing the criminal division from the IRS and putting it into something like the Federal Bureau of Investigation. When the IRS in their process of collecting taxes discovers evidence of wrongdoing, a reference over to another agency, in my mind, would not be overcumbersome and would probably make it difficult for the criminal agents and the civil agents to be working for the same master and the criminal agents who, as a result, wind up having to take into consideration what that master wants then on the civil side.

Once again, I appreciate the opportunity to speak here, and I think the panel is available for any specific questions. I would ask Mr. Mark to join me.

[Mr. Waller's prepared written testimony follows:]

## STATEMENT OF

## WILLIAM C. WALLER, JR.

## CONCERNING ABUSES OF THE INTERNAL REVENUE SERVICE AND JUSTICE DEPARTMENT

Mr. Chairman and distinguished members of the Subcommittee, I am deeply appreciative of this opportunity to appear before you this morning to present my views regarding certain examples of misconduct and impropriety exhibited by the Internal Revenue Service and the United States Department of Justice.

My name is William C. Waller, Jr. and I am a shareholder and director of the law firm of Waller, Mark & Allen, P.C. of Denver, Colorado. I received my undergraduate degree from the United States Air Force Academy in 1969 and served for five years as a Special Agent with the Office of Special Investigations. Following my tour of duty in the Air Force, I attended law school at Cornell University, and then returned to the Denver area where I have since practiced law as a trial attorney. My firm's practice is limited to trials and includes substantial representation of clients in criminal matters before the Federal Court.

I commend you, Mr. Chairman, for your concern regarding the misconduct and improprieties present in the Kilpatrick case and other cases and urge this Subcommittee to seriously consider reforms in the improper use of the criminal justice system by the Internal Revenue Service and the Tax Division of the Justice Department.

From August of 1981 to the present I have represented Mr. William A. Kilpatrick and his company, United Financial Operations Inc., during the course of a grand jury investigation and criminal proceedings following the indictment. During that time, I have observed a criminal process that in my opinion was out of control. In certain instances, this was due to inadequate guidelines and rules to insure that the process of enforcement of the tax laws is not misused or abused. In other instances the process was out of control because of well meaning but overzealous agents and attorneys. Finally, the process was out of control because of untrained and insensitive individuals who failed to recognize the limitations of their roles and who chose to abuse their positions either for personal gain or due to misguided views of their roles in society and the criminal justice system.

The investigation of William A. Kilpatrick and his associates began in 1979. Evidence was presented to a grand jury in Denver during 1981 and 1982, but the term of that grand jury expired without an indictment being returned. Evidence was then presented to a second grand jury which returned an indictment in August of 1983. The indictment contained twenty-seven (27) counts. The first twenty-six (26) counts charged various tax related offenses against Mr. Kilpatrick and the other defendants. The final count charged Mr. Kilpatrick only with obstruction of justice. In February of 1984, Judge John L. Kane, Jr. dismissed the first twenty-six (26) counts for failure to charge a crime and as improperly pleaded. In May of 1984, Mr. Kilpatrick went to trial on the remaining obstruction of justice count. A jury returned a guilty verdict, but Judge Fred M. Winner granted Mr. Kilpatrick's motion for a new trial, ruling that Mr. Kilpatrick had not received a fair trial because of the misconduct of the Government. In hearings related to the motion for a new trial, as well as additional hearings held before Judge Kane following Judge Winner's retirement, additional evidence concerning misconduct by the Government was exposed. This resulted in a second Order by Judge Kane dismissing the entire indictment on grounds of misconduct. Both dismissals were appealed by the Government, and the case is presently pending before the U.S. Court of Appeals for the Tenth Circuit in Denver.

If I believed that the Kilpatrick case was an isolated example, I would be upset that it had happened, but I would not believe that hearings such as this would be justified. However, my experience has confirmed that this is not the case. There are numerous instances where the system has broken down.

The criminal justice system is administered by people, and people have frailties. Many of these frailties were also the basis of the recent decision of Judge Black of Maryland in United States v. Omni International Corp. (No. B-84-00101) (May 15, 1986), which was a criminal tax case in which the prosecuting attorney and IRS agents actually created, altered and suppressed numerous documents in an attempt to conceal their misconduct. The Government personnel in Omni denied these activities and their untruths were made known only because the defense was able to prove that the paper upon which the documents were printed had not been delivered to the Government until after certain dates.

These cases are examples of why it is necessary for the rules to be sufficiently strict and clear to prevent abuse of the system. Nowhere is it more important than in the criminal justice system for the legislature to insure that the process is one of laws rather than one of men.

From time to time during the course of our history certain themes or issues have gained political prominence. If the criminal justice system is subject to undue influence or the whims of individuals within the system, that system can be used to carry out or enforce the politically popular movement of the moment. During the 1960s there was concern because the criminal justice system was misused in some cases to silence political dissent. In the late 1970s and 1980s I believe we saw cases in which the system was misused to carryout certain policies of the Internal Revenue Service. The system should be as immune as possible from these improper influences.

During the last twenty years the Justice Department has been before this body constantly seeking reforms to make its job easier and to make the administration of the criminal laws more efficient. These may be proper concerns under the right circumstances, but it is the duty of this body to maintain the delicate balance between the need for government to maintain law and order and the rights of the individual citizens. It is a terrifying thing to be a target or defendant in a criminal proceeding. The resources of the Government are seemingly unlimited, and as in the Kilpatrick case, an individual may find himself ruined financially and otherwise by having been forced to endure the process.

It is not my desire to speak to those items which have been discussed previously but rather to bring to your attention certain matters that have gone unexamined or which I believe need to be emphasized. It is also my desire to attempt to formulate for this Subcommittee some of the conclusions I have drawn and to set forth certain recommendations for action that this Subcommittee should take to help insure that the types of abuses which occurred in this case will not recur in the future.

Before I do this, I would like to point out certain aspects of the Kilpatrick case that are most important to understanding how and why the abuses present there are likely to recur under existing conditions. First, federal income taxation is a very complex area of the law. As a practicing attorney I do not believe that there are any laws in this nation more complex and misunderstood than the tax laws. I am not a tax practitioner, but I have been present in courts and in meetings on numerous occasions where highly qualified tax lawyers have come to conclusions diametrically opposed to each other as to the meaning of certain tax laws. I recognize that it is the desire of Congress to simplify the tax laws, but I do not believe that ever can or will be accomplished. Thus, unlike most criminal laws which deal with fairly straightforward concepts that are easily understood by all people, such as bribery, forgery, robbery, murder and burglary, the tax laws deal with concepts that are so subtle and so complex that it is literally possible for a defendant to accidentally violate the criminal law.

I recognize that there will always be people who will attempt to avoid paying taxes. I recognize that these people should and will be examined closely by the Government as to their motives and methods. I also recognize that these controversies will frequently be difficult and vigorous. This is as it should be. Taxpayers ought to have the right to challenge the Government, and the Government must have the power to collect taxes. However, arguments as to the meaning and impact of various tax laws should generally be civil in nature and should not become the subject of criminal prosecution. The criminal justice system should not be used as a shortcut for collecting taxes. The IRS already has very broad powers to do this in administrative or civil contexts.

The second preliminary point is that when we are dealing with the tax laws, we are talking about a very special relationship between the Government and the individual citizen. An income tax requires that the Government gather tremendous amounts of information regarding such things as sources and amounts of income and the basis of various deductions. Therefore, the Government has the right to gather extensive information about its citizens, and those citizens are required to provide to the Government massive amounts of information concerning their most private business affairs. This can be, and often is, a very dangerous situation. We need only look back to the Watergate era when the IRS was the source of information and the means for action which was taken against those who had been placed on a list of political enemies. I mention this because the enforcement of the criminal laws in this area creates the greatest risk of harm and of violations of the constitutional foundations of our Government.

Finally, in order to appreciate the nature of my observations, one must fully understand the role of the grand jury. The grand jury has been a basic part of our system of criminal justice since the founding of this nation. It finds its roots in the English common law system. It is intended to be a check on the power of government to charge its citizens with criminal conduct. It recognizes that if the Government could indict anyone it wished, at any time, the power could be too easily abused to punish political enemies. It also appreciates that being indicted is in and of itself a very traumatic experience and a terrible drain on a person's reputation and financial resources. Therefore, the Government is prohibited from charging someone until it has shown to an independent grand jury that there is probable cause to believe that the person has committed a crime.

This process is an inconvenience to the Government and is not intended to create an efficient criminal justice system. Rather, it is intended to be a stumbling block for the

Government, and there will always be a natural animosity between law enforcement and the grand jury process.

One practical problem with the grand jury process that has always been present is that total responsibilty for presenting the case to the grand jury, and insuring that the grand jury remains a truly independent body, resides with the prosecuting attorney. Theoretically, the prosecuting attorney knows of the important role of the grand jury and is capable of dispassionately presenting evidence to the grand jury.

In practice, however, this is not the case, and most prosecutors will freely admit that it is easy to manipulate the grand jury proceedings so as to obtain an indictment except in the rarest of cases. In fact, it has been my experience that a young prosecutor who fails to get a grand jury to return an indictment is often the subject of office jokes. Even if a grand jury refuses to issue an indictment, it is easy for the U.S. Attorney to present evidence to another grand jury in order to see that an indictment is returned.

As will be discussed below, it appears to me that the charade should be ended, and that the Congress should enact certain much needed grand jury reforms to reinstate the independence of the grand jury. Unless the grand jury is a truly independent body, it cannot possibly serve its function of being a check on the activities of the Government. As long as prosecutors are assigned to various task forces that actually conduct investigations or specialized divisions that do the bidding of particular agencies, such as the Tax Division of the Department of Justice which carries out the bidding of the IRS, it is not reasonable to expect the prosecutors to be able to perform their duties as dispassionate advocates before the grand jury.

Because of the unique and limited role of the grand jury in our society there have been strict limitations placed on both the use of the grand jury and dissemination of the information gained by the grand jury. Until now, the grand jury has been strictly a criminal procedure. It has broad investigative powers and therefore allowing the Government to use it to gather information for civil and administrative processes would be unfair and contrary to its purpose. Thus the information gathered is to be used only in criminal cases. The Supreme Court recently reaffirmed these concepts in the 1983 companion decisions of United States v. Sells Engineering, Inc., 463 U.S. 418 (1983), and United States v. Baggot, 463 U.S. 476 (1983).

The problem in tax cases is that the Internal Revenue Service is charged with a double function. First, it must assess and collect taxes. In order to do this, it must gather tremendous amounts of information. Because of its limited resources it often creates programs such as the "abusive tax shelter" program in order to maximize the efficiency of its efforts. At the same time the agency is charged with undertaking criminal tax investigations. The criminal agents work hand in hand with the civil agents. Various policy consideratons which are important to the civil side become improper policy considerations on the criminal side.

It is very tempting for the IRS to utilize its limited manpower by having the criminal agents call upon the much broader powers of a grand jury in order to gather information for the benefit of civil enforcement proceedings.

These problems are exacerbated by the practice of the Government, in this case and others, of storing the grand jury materials in the custody and control of the IRS, rather than the U.S. Attorney, in direct violation of Rule 6(e) of the Federal Rules of Criminal Procedure. This made it impossible for the Court to insure that adequate safeguards were in effect to maintain the secrecy of the grand jury proceedings. The Court was forced to rely on the statement of the IRS agents that adequate safeguards had been in place. In view of the numerous other examples of misconduct this was clearly inadequate.

In criminal tax cases the same executive agency has responsibility for both civil and criminal functions and various policies designed to maximize the efficient use of limited resources become policies not only for the civil agents but also for the criminal agents. When Congress passes a law limiting the power of the civil agents, it does not impact the criminal investigators. Therefore, it is very tempting for the IRS to avoid Congressional mandates by transferring various investigative responsibilities from the civil to the criminal side, and there is always the temptation to cast what is actually a civil disagreement regarding the meaning of the tax laws into a criminal case.

With this background in mind, I will now turn to some specific items which I observed during the course of the *Kilpatrick* case. In some instances, I will not be able to discuss specific details because the case is still pending, but I believe that my remarks will be sufficiently specific to be useful without violating the Code of Professional Responsibility.

Most importantly, it is unmistakably clear that it was the expressed purpose of the IRS to utilize the federal grand jury to gather information that would be used by the service to assess and collect taxes civilly. We know this for several reasons. First, the civil investigation was abated or halted during the course of the criminal investigation. The IRS routinely does this, claiming that it is required to do so under the law. If the civil and criminal functions were truly independent, this would not be necessary. In fact, there would be every reason for the civil side of the service to get on with its investigation in order to collect past due taxes as quickly as possible. Second, immediately after the indictment, the civil side sent out notices of disallowance which parroted the language of the indictment and stated that evidence to support the conclusions would be forthcoming from the criminal case. It was anticipated by the IRS that the case would ultimately go to trial and that the evidence would become part of the public record at that time. That never happened here, but interestingly, much of the information has nevertheless found its way into the possession of the civil side of the IRS. Next, the service assigned civil auditors to assist the grand jury during the course of its investigation. They caused the grand jury to subpoena much information that could only be of interest in a civil audit and assessment. In addition, they interviewed numerous investors and others for purposes which seemed to be totally unrelated to the criminal charges. The indictment in fact failed to rely on any of that information.

Rule 6(e) of the Federal Rules of Criminal Procedure provides that all of the information before the grand jury is secret and puts severe limits on the use of that information for purposes other than criminal trials. Nonetheless, it was common practice in this case, as in numerous others, to send letters to people all over the country who were customers of United Financial Operations indicating that the principals and attorneys of the company were under investigation by a federal grand jury in Denver, Colorado. You can imagine the impact that this had on the business of United Financial Operations. I have heard on many occasions that Mr. Snyder bragged to several people that even if he did not convict Mr. Kilpatrick, he would break him. It is clear that these types of actions were either calculated to do so or, even if not, went a long way toward accomplishing that result. Neither the Government nor the IRS should be able to put a company out of business merely by having a federal grand jury contact the customers of the company in order to intimidate them into failing or refusing to pay their obligations to the company or to enter into any other dealings with it.

Mr. Robert Grossman in his statement to this Subcommittee has detailed his dealings with the Justice Department attorneys assigned to handle this matter, and I will not go over those points again. However, there is one point that Mr. Grossman referred to which needs to be emphasized. It is absolutely essential that the Tax Division have trained lawyers who are intimately familiar with the complexities of the tax laws. Otherwise, the process is a mockery. In this case all charges, except one non-tax charge against Mr. Kilpatrick only, were dismissed prior to trial but long after the indictment and its attendant publicity, which was actually promoted by the Justice Department. I am convinced that if the Department had seriously considered the nature of the law in this area, it would have concluded, as did Mr. Grossman, that not only was the tax shelter not criminal, it was in all likelihood perfectly valid under the tax laws.

We are obviously dealing here with very complicated business transactions that are structured in particular ways in order to maximize the tax benefits from the transactions. Mr. Kilpatrick and his company would not attempt to argue that the complex structure was necessary solely for business reasons and would agree that it was structured in order to take advantage of the tax laws. It must be understood that there is and should be nothing wrong with that. Any disagreement as to tax consequences under these circumstances was a battle that should have been waged in civil proceedings in the Tax Court. Some of the attorneys for the Government were totally surprised when Judge Kane dismissed the indictment on technical tax grounds. Until that time they failed to sufficiently understand the tax laws so as to appreciate that dismissal was a possibility.

There were numerous examples of misleading grand jury testimony with regard to both the effect of the law and the facts of the case. In a grand jury investigation involving a tax matter, it is not uncommon (in fact it is the normal practice) for the Government to call an IRS agent to have him testify that the law means something and that a particular transaction violates the law. The problem is that although the agent who is called to testify may know more than the prosecuting attorney, he is not a lawyer and does not always fully appreciate the complexities of the tax laws. In short, his testimony may be dead wrong.

The problem is obvious. The laws are practically unintelligible except to the most sophisticated tax practitioners. Most grand jurors have no more understanding of them than the average man in the street. Transactions designed to take advantage of the laws appear to be suspect in the first place. The grand jury naturally puts great weight on the testimony of the IRS agent, and the government lawyer has neither the knowledge nor the motive to cross examine the agent regarding his opinions.

This is exactly what happened in the _Kilpatrick_ case. Two

IRS agents, neither of whom were attorneys, were examined before the grand jury by two Justice Department attorneys, neither of whom knew much about the tax laws. They were asked in conclusory fashion whether what Mr. Kilpatrick or his associates had violated the tax laws, and they both testified affirmatively. According to Judge Kane, however, that testimony was wrong. However, the grand jury never had that knowledge.

When Mr. O'Donnell attempted to have a legitimate tax expert, Professor Roland Hjorth of the University of Washington School of Law, testify, Professor Hjorth was badgered by the Justice Department attorney to such an extent that his testimony was undoubtedly discounted by the grand jury. If there had been intellectual honesty before the grand jury, the indictment might not have been issued. Unfortunately, although incidents like this appear to be quite common, they are only rarely uncovered.

To add insult to injury in this case, we discovered that the Government had presented inaccurate testimony regarding the facts of the case. The law allows the Government to present hearsay testimony before a grand jury as well as evidence that may not be admissible at trial because the grand jury does not make the ultimate determination of guilt or innocence. However, there is a danger that when the Government relies on hearsay, the testimony will not accurately present the real facts. This is especially a problem when a Government agent is the source of the hearsay testimony. In this case, the evidence concerning the Bank of Nova Scotia was so erroneous that it is difficult to understand how it could have been presented accidentally. Moreover, this inaccurate hearsay turned out to be about the only evidence presented to the grand jury which implicated the bank.

The remedies which should be available in the event of abuses like the ones in this case raise difficult questions which involve numerous competing policy considerations. Dismissal of an indictment might allow a criminal to go unpunished, but at the same time there must be adequate deterrence to keep the government from breaking the rules. That is especially the case in the context of the grand jury because grand jury secrecy protects not only the witnesses who testify and the targets of unwarranted investigation, but it often protects the Government because its improprieties are not discovered. Only rarely, when there is a very substantial preliminary showing of a likelihood of grand jury abuse, are the grand jury proceedings made available to the defense. In the overwhelming majority of cases the defense never gains access to the grand jury materials, because the Court, frequently incorrectly, believes that the Government probably acted as it was supposed to act. That is why I believe that the Government agents in this case testified accurately when they said that their conduct here is the same as in many, many cases throughout the country. That is probably true because the improprieties in those cases were never discovered.

Even in the few cases where the necessary showing is made, problems can develop, as noted by Judge Kane in this case, because the Government controls the transcripts and materials and does not always follow the Court's Orders of disclosure. Judge Winner initially ordered that all transcripts of the grand jury proceedings be turned over to him for his _in camera_ review. He then ordered that the transcripts be made available to defense counsel. Defense counsel noticed that there were several gaps in the testimony and asked the Government to verify that all transcripts had in fact been turned over. The Government then admitted that there were seventy-eight (78) instances where there had been grand jury proceedings for which transcripts had not been provided. Judge Kane on two separate occasions was required to order that the Government comply with Judge Winner's initial order. Although defense counsel has to this date never received all of the transcripts, it is noteworthy that many of the instances of the most serious misconduct were evidenced in the transcripts which were initially held back.

Dismissal of the indictment in this case was without prejudice. That means that the Government may properly present the case to another grand jury which could return another indictment. The Government has argued that such a remedy is too extreme. I must respectfully disagree. If the Government believes that it has a strong case, there is nothing to prevent it from going to another grand jury. On the other hand, failure to dismiss the indictment would leave the Defendant with no remedy at all.

The Government has stated that any wrongdoing by its attorneys could be investigated internally by the Justice Department and appropriate discipline meted out against the responsible individuals. After having been a criminal agent for the Government myself, and having observed the actions of the Government firsthand as a criminal defense lawyer, I strongly agree with Mr. Grossman's statement that the Justice Department will never adequately investigate and discipline its own. It is much more likely that there will be coverups or whitewashes in the event of wrongdoing. After extensive hearings in this case, two different federal judges wrote opinions which contained very strong criticism of specific attorneys and agents. Nevertheless, the Justice Department has taken the position that neither it nor any of its personnel did anything wrong.

The only effective remedy to prevent abuses like this from occurring regularly is to dismiss the indictment. In extreme cases I believe the indictment should be dismissed *with* prejudice. The *Kilpatrick* case may very well be one of those extreme cases in view of the length of time that Mr. Kilpatrick and his associates have been under investigation and the tremendous resources they have been forced to expend in order to fight the Government. Other cases may warrant dismissal without prejudice.

In conclusion, there are eight specific actions that I believe the Congress should take. Some of these involve specific votes regarding bills which are currently pending. Other actions concern the drafting of legislation to effect the proposed changes.

First, the Congress should enact the proposed Grand Jury Reform Act which is currently pending in the House as H.R. 1407. I will not attempt to go over all of the provisions of that bill, but one major aspect of it is to approve the practice of allowing witnesses before the grand jury to be accompanied by, and to confer with, attorneys of their choice. This would not only save time, it would prevent abuses such as the improper testimony of Mr. O'Donnell and the badgering of Professor Hjorth. It would also encourage some people to testify who would not otherwise be willing to do so. Criticisms of this portion of the bill by the Justice Department have not been borne out by the practical experience in the seventeen (17) states, including Colorado, which have adopted grand jury reform along these lines.

Second, Congress should take the criminal investigative function away from the Internal Revenue Service and place it with the Federal Bureau of Investigation. This would insure that all criminal investigations are conducted independently, free of any improper considerations of civil enforcement. The FBI has the expertise and ability to investigate these types of crimes. In fact, personnel within the FBI are probably better trained to investigate these types of crimes than is the IRS.

Third, the Congress should enact legislation which prohibits the use of any information reflected on tax returns for any purpose whatsoever except: (1) the assessment and collection of taxes; and (2) the prosecution of the person filing the return for including false or misleading information on the return. We have all heard of instances where an organized crime member has been convicted of a crime because of information reflected on his or her tax returns. At first, we might all applaud such an outcome, but upon closer consideration, we should all be concerned. The purpose of a tax return is to provide information to the Government so it can calculate taxes - not to provide valuable criminal intelligence. A rule such as the one I am proposing would undoubtedly increase tax collections and avoid several very serious constitutional questions.

Fourth, the Tax Division of the Department of Justice should be given the resources to have qualified tax lawyers responsible for the major decisions in the criminal process. It is rediculous that the lawyers conducting the grand jury had little if any experience in the area of tax law. The complexity of the laws make it impossible for the attorneys to understand whether a crime has been committed unless they have a working knowledge of the tax laws.

Fifth, H.R. 3340, which is the administration's proposed legislation to overrule the decisions of the Supreme Court in United States v. Sells Engineering, Inc., supra, and United States v. Baggot, supra, should be defeated.

Sixth, the Congress should enact legislation which has been proposed to overrule the recent decision of the Supreme Court in United States v. Mechanik, 106 S.Ct. 938 (1986). This decision is an abomination which effectively eliminates any remedy in cases of abuse of the grand jury process.

Seventh, the Congress should enact legislation to modify the Jencks Act, 18 U.S.C. §3500, to require the Government to provide all Jencks material prior to trial as part of the discovery process. There is no policy reason for delaying the exchange of that material until trial. In fact, it is not uncommon for U.S. attorneys to do so now. This would allow defense counsel a greater opportunity to discover evidence of grand jury abuse at a meaningful time in the criminal proceedings.

Finally, the Congress should enact legislation overturning the judicial precedent which holds that grand jury materials will be made available to the Court for in camera inspection or to the defense only upon a showing that there is a substantial likelihood of abuse before the grand jury. This rule makes no sense whatsoever because it creates an impossible Catch - 22! How can evidence of the abuse be discovered unless transcripts of the grand jury proceedings are made available for inspection? Instead, legislation should be enacted which makes the transcripts available upon a showing that there may have been misconduct before the grand jury. If the government would like to have the transcripts viewed in camera prior to having them made available to the defense, the Government could be allowed to make such a request upon a showing that there is a substantial reason for doing so. In addition, the defense could be required to maintain secrecy of the grand jury proceedings. This is often done without jeopardizing the process.

In summary, the Kilpatrick case included numerous instances of improper actions by the Government, but unfortunately it was unique only because it included a very large number of those instances and the misconduct was uncovered. Each specific instance occurs over and over again in cases around the country. I have tried to explain here that there are certain institutional reasons which make these problems likely to occur, and that important changes in the current law are necessary to protect against future occurrences. There are serious problems which exist in the administration of justice in the tax area. These wrongs should never have occurred. Congress can and should take specific action to prevent this in the future.

This concludes my prepared statement. I thank you for the opportunity to present my views here today and I would be pleased to answer any questions the Subcommittee may have.

Senator GRASSLEY. Thanks to all of you.

Mr. Kilpatrick, you have stated that the pattern of taxpayer abuse that you seem to have experienced is pandemic—those are your words—in the IRS and the Justice Department. Do you or your representatives have evidence of alleged widespread abuse beyond your own case that you can offer to the judgment of this subcommittee?

Mr. KILPATRICK. I don't have the documents with me, but it is a matter of record in the transcripts of the court hearings, when the judge turned to one of the witnesses on the stand—excuse me, the prosecutor asked the question, "What is your name, who do you work for, what are your duties?"—he said, "My duties for the last 2 years, I've been an agent in the grand jury." Judge Winner's head almost snapped off his shoulders, and he said, "You have been a what?" He said, "I've been an agent in the Grand Jury." He said, "You can't be an agent in the Grand Jury." He said, "Yes, I can." the judge said, "No, you can't." They got into an argument. The judge said, "Who told you you could be an agent in the grand jury?" He said, "Mr. Snyder. He swore me in."

The judge turned to Mr. Snyder and said, "Who gave you the authority to swear somebody in for any purpose, to issue an oath for any purpose, much less the illegal purpose of putting an agent in the grand jury?" He said, "We do it all the time." The judge said, "What do you mean, you do it all the time?" He said, "We do it everywhere."

"Where have you done it?"

"I have done it in Georgia, in Alabama." As I said in my statement, we can take their word for it.

Then they brought in—I have forgotten his name; he is retired and is now with a law firm in Dallas and had been a deputy attorney general. They brought him in to verify, on the record, that "we do it all the time. We always have agents in the grand jury." In fact, in their pleadings they come back and they carry it further. In their pleadings on the appeal of *United States* v. *Kilpatrick*, they come back and say, "Gosh, here are the examples in which we have gotten away with it. Here are other cases in which we have done it, and here are other situations in which it works out." And you can go through almost everything that they have done, all what I refer to as "criminal acts."

For example, when they shredded evidence potentially favorably to me, like in the Jencks Act material that Bill referred to a moment ago, the way it comes out is, Mr. Rabun was on the witness stand, and he was asked, "Have you seen this document?" And it just kind of fell out of his mouth before he could think of it. He said, "Oh, yeah." He was asked, "Where?" He said, "The Embassy in San Jose, Costa Rica." "What happened to it?" "I shredded it." "You what?" "I shredded it, but it was an accident." How do you accidently shred a document?

The question then came up, "Has anyone told the defense that you shredded that document?" "No, I told Mr. Snyder." Then they got into an argument. Mr. Snyder said in court, "You did not." "Yes, I did." "You did not." "Yes, I did. It is in your briefcase." "It is not." "I'll show you."

The judge says, "Go and get out this thing." Then Rabun goes to the prosecutor's table and pulls it out of the assistant U.S. attorney's briefcase. How on Earth can an investigation clear people for doing things like that, when it is to clearly on the record, it is their own testimony?

You can go through the entire case. Lord, it fills a filing cabinet. But I could pull out—in fact, I have a document here in which I list the 102 crimes. I state where the evidence came from and the source of that and what law it violates. So, it is fairly easy to trace down.

The answer to your question is: Yes, sir; we do have proof.

Senator **Grassley**. Now, as you just mentioned this sort of misconduct, and you mentioned the Costa Rican situation, could you elaborate on other apparent destruction of evidence? And I would also like to have your attorneys comment on it, too, if they would, because I think this is very important.

First of all, I would say that the things you have described here, the perception with people at large, if they have been audited, is that these sorts of things could happen; so you aren't painting a picture here describing something that is not perceived by people who have had something to do with the IRS beyond just the usual filing of income tax.

We want this record to be very complete in our review of these abuses, so in line of the question I just asked I would appreciate further comment.

Mr. **Kilpatrick**. I don't know that I have any further evidence of shredding documents in other cases. I am not familiar with that in depth.

Senator **Grassley**. Well, let me go on to Mr. Grossman and maybe Mr. Waller, to fill in if they can.

Mr. **Grossman**. We represent a number of people all around the country, not just people like Mr. Kilpatrick but others who are involved in the prosecutorial web. I am going to give you an example of a case that is of record that is, I think, evidence of further kinds of action by the Internal Revenue Service but in another district, because it is a nationwide epidemic, in my view.

I represent an individual in Florida.

Senator **Armstrong**. What is the nationwide example that you speak of?

Mr. **Grossman**. I think a pattern of Internal Revenue Service and Justice Department overreaching with the law, as I would call that.

As an example—and I try to make this because it is a matter of court record—I received a call from a client of mine in 1983 that his offices were being ransacked by agents, special agents of the Internal Revenue Service, with a warrant. And immediately they took all of his books and records, and I asked to see a copy of the warrant signed by a judge. I was told in that case by the Department of Justice that the warrant had been sealed, and that I would be deprived of being able to review the document for probable cause which gave rise to the search in the first place.

So, I moved in court for a return of all my client's papers, because he could not operate his business without it, and the Justice Department opposed that return. And Judge Paine in West Palm

Beach ordered the return of the copies of the documents and for Justice to remain in possession of the originals.

We are now at June 20, 1986. There has been no prosecution of my client. There has been no grand jury convened, and there has been absolutely nothing done to return the originals of my client's papers. He and his records have been violated, and there has been no redress.

I moved to appeal the judge's decision to only return copies, and the eleventh circuit told me that the case had not been final; that is, since there was no final judgment, the Justice Department was authorized to keep the papers until there was a completion of the criminal case and until the doctrine of finality had worked its way through.

So, I have seen situations around the country where you have the Internal Revenue Service and the Department of Justice working hand in hand to do things that deprive the taxpayer of the elemental right for confronting what has been said against him.

If you are a defense attorney and you want to challenge a search, but you can't see the warrant on which the search was based, which the Government took from a Federal judge, you can't defend your client, and it is a catch-22. And in criminal cases where I have been involved, where I have seen allegations of Government impropriety, the Government will not grant you access to its papers so that you cannot prove, as a threshold matter, what it was you sought to prove in the first place. Without access to Government documents, you become absolutely ineffective to prove the point which, if the documents were available, may well be proved; which is to say that there was no probable cause or that there was impropriety.

*Kilpatrick* is a rare case, and so is *Omni*, where there is enough financial resources to hire experts and to prove things enough so that the judge would say, "Turn the papers over." But that is not true in most cases; it just takes too many resources to uncover the evil.

Senator ARMSTRONG. Mr. Chairman, before we move on to other matters, could we just pin down a couple of issues on this *West Palm* case?

You mentioned that is on the public record. Would you tell me the name of the company or some way I can cite this for the Justice Department?

Mr. GROSSMAN. Yes. *Goldmar* v. *Greley*.

Senator ARMSTRONG. Goldmeyer?

Mr. GROSSMAN. Versus *Greley*, G-r-e-l-e-y, which is the name of the special agent involved in the case. It was a case before Judge Paine, P-a-i-n-e, in West Palm Beach, and its appeal was taken to the Eleventh Circuit Court of Appeals.

Senator ARMSTRONG. OK. And, in brief, the facts as you have stated them are that—in what year were the records seized?

Mr. GROSSMAN. In 1983.

Senator ARMSTRONG. In 1983. And when did you last move to have the records returned?

Mr. GROSSMAN. In 1984, I believe, we moved to have the records returned, and we appealed the case in 1985. We have heard nothing from the Federal Government whatsoever—no return of documents, and no prosecution.

Senator ARMSTRONG. No prosecution?

Mr. GROSSMAN. No, sir.

Senator ARMSTRONG. No indictment?

Mr. GROSSMAN. No, sir, no grand jury.

Senator ARMSTRONG. And no access to the documents or other evidence that led to the search warrant in the first place?

Mr. GROSSMAN. It is still being under seal, and we had a meeting in Miami with the District Counsel's Office of the Internal Revenue Service this past year. They said, in essence, "Give us excuses."

I said, "What did my client do wrong?" And at that meeting they in essence told me, "Ask him; he knows best."

Senator ARMSTRONG. Ask——

Mr. GROSSMAN. "Ask your client; he knows what he did wrong."

Senator ARMSTRONG. Thank you, Mr. Chairman.

Senator GRASSLEY. Mr. Waller, I want you to continue on this train of thought, but then be ready, Mr. Grossman, for some further questions about this national pattern. And then, in light of that, Mr. Kilpatrick, think in terms of what you said, that this plot against you was conceived at the top. I want some explanation of that.

But first of all, I want Mr. Waller's response to the previous questions.

Mr. WALLER. Your Honor, like Mr. Grossman, we have had an opportunity during the course of our representation of people in these cases to appear in several Federal courts in different places around the country—in Philadelphia, in Tennessee, in California, in Idaho, and in Colorado, for example.

It seems to me that in many of these cases that a couple of patterns are present, and I think the testimony in the *Kilpatrick* case seemed to support that. I will try to be very brief, so we can move on to other matters, too.

With regard to the storage of materials, almost all of the materials in the *Kilpatrick* case were maintained under the custody of the IRS. Now, under the rules set forth to me pertaining to grand jury independence, the Department of Justice attorney who is conducting the grand jury is given complete responsibility to make sure that that testimony and the materials are maintained separate and are kept sacrosanct.

What happened in our case is that we eventually got testimony out that showed not only did the IRS agents rent and lease the space where the documents were kept and maintained those documents, and went back and forth between their offices with those documents, but that the grand jury documents subpoenaed by the grand jury were actually maintained in offices of the IRS, theoretically in file drawers and desk drawers that were marked to be kept separately. And the testimony was that that is the normal pattern, and I have found that pattern in most cases. In fact, it is hard to determine who is actually conducting the grand jury investigation. Is it the IRS and the U.S. attorney comes in and more or less just presents the case that the IRS wants presented? Or is it really the U.S. attorney who is presenting the case to the grand jury, and the IRS agent is working for him?

In our case, we had IRS agents that were actually dictating these pocket-immunity letters that there was some testimony about yesterday, on U.S. attorney letterheads, and sending them out over their signature.

The use of grand jury agents which was highly criticized by Judge Kane and Judge Winner and has been criticized by some other courts, although not criticized by some courts, is an example of widespread—it is not unusual at all for grand jury agents to be appointed, those usually being IRS agents. And the use of pocket immunity. Almost every "grand jury agent" I have ever seen has always been an IRS agent who has been appointed as a grand jury agent.

Pocket immunity? We talked about that yesterday. The use of that is widespread, and there are all sorts of policy issues involved in that.

Ironically, and one thing Judge Winner did not mention, the Department of Justice issues pocket immunity, and as I believe Judge Winner indicated, there was testimony in our case that they believe they have the inherent power to issue immunity, and it does not necessarily flow just from Congress. However, the Department of Justice has in its own manual set forth specific procedures for issuing pocket immunity. The problem in this case and in other cases I have been involved in is that the U.S. attorneys routinely ignore their own manual, and their own manual does provide some pretty stiff guidelines to control the issuance of immunity.

Immunity can be a problem if you are representing a lead defendant like we were in this case, and every witness who testifies against you has a contract with the Government that they won't prosecute him; because there is always that unspoken fear in the back of the witness' mind that, since his agreement is with the Government, the Government may be able to make that agreement; whereas, if it is approved by a court and set forth by a court, the witness knows that he need only worry about answering to a court.

Senator **ARMSTRONG**. Is that a valid concern? Should a witness be concerned about that? Are there instances where they give them pocket immunity and then doublecross them?

Mr. **WALLER**. As a practical matter—I could answer that question in kind of a long-winded fashion—I think it is a valid concern, and I think a lot of witnesses have it. I specifically have never run across a case where a prosecutor actually pulled the immunity out from under the witness. However, I have had prosecutors who have hesitated to provide the pocket immunity, if you will, in a written form.

Senator **ARMSTRONG**. Well, just for the benefit of somebody who never heard of pocket immunity until very recently, when we say "pocket immunity" in the way you are describing it, literally that is nothing more than some prosecutor saying, "If you cooperate, we are not going to bring anything against you."

Mr. **WALLER**. That is correct.

Senator **ARMSTRONG**. He doesn't write it down, in the case you just described.

Mr. **WALLER**. If he follows the procedures, it will be written down.

Senator **Armstrong**. I understand; but what you just said was that in some cases they will refuse to provide letters.

Mr. **Waller**. That is correct.

Senator **Armstrong**. It doesn't go before the court—the court doesn't sanction it.

Mr. **Waller**. That is correct.

Senator **Armstrong**. It is just, you know, two guys out by the water cooler saying, "If you will help us out," or if you will do this or that, or if you don't do this or that, or for some reason or another we promise not to bring a case.

Mr. **Waller**. Yes—literally out by the water cooler. That is where it normally happens.

Senator **Armstrong**. I understand; I just saw that on television a couple of nights ago. [Laughter.]

That is about how much I know about it, too.

Mr. **Waller**. Now, if you read the U.S. attorneys manual, there is a specific procedure for even when they are issuing these letter agreements, or pocket immunity, or whatever you want to call it, for them to go through. And it would be written. It is basically just a contract not to prosecute. In other words, they say, "If you agree to do this, we will agree not to prosecute you." It is not actually a formal grant of immunity that the prosecutor can request that the court grant. As Judge Winner said, that is really more of an administerial function; the court doesn't really make a determination that immunity should be granted, or whatever. You just go through the procedure.

The *Omni* case is another case just like ours. Two things occurred. I am concerned when you get big cases like this that are used to intimidate everybody else in the tax shelter business. It often happens.

Mr. Grossman testified regarding his conversations with the reviewers prior to bringing down an indictment, and ultimately the indictment was dismissed on the very grounds that Mr. Grossman had brought up initially.

In the *Omni* case, if you read that opinion, you will see that in fact that was handled by a local U.S. attorney office instead of the Tax Division of the Justice Department. But they also presented that case to a reviewer, and the reviewer initially, in that case, said, "I think the government has a real problem here; I think we are talking about a civil tax problem, and we are not talking about a criminal tax problem."

Three days later was when the U.S. attorney and the IRS presented a document to that reviewer that changed the reviewer's mind. They went forward with the indictment, anyway. It had an impact on the reviewer's decision, and ultimately they discovered that that document was in fact a manufactured document; they manufactured a witness interview out of whole cloth and in fact misstated what a witness had said.

So, you have a situation where apparently in the *Omni* case it had a substantial investment of time by the IRS, and it was seen as one of these "flagship cases," which would have a big deterrent value if it came down as a criminal indictment.

You have a Justice Department lawyer reviewing the case and saying, "I don't think we've got a crime here," and you have the

IRS going back and, in that case, actually manufacturing evidence so they could go forward with an indictment. And that case ultimately wound up being dismissed not on a failure-to-state-a-crime basis but for prosecutorial misconduct, including the manufacturing of that witness statement.

Finally, I guess it is just nothing more—and there will be some other defense counsel who will be testifying before you, and I am sure some of the prosecutors have had experience in front of the grand juries. I would be interested in seeing the statistics of the number of grand juries that sit and then decline to return a true bill or an indictment when asked to do so by the Government. My suspicion is that oftentimes the Government is conducting these things as a rubber stamp and that very rarely does a grand jury either subpoena witnesses on its own or subpoena documents on its own, or decline to return an indictment when requested to do so. Perhaps the Department of Justice could provide some statistics or information to this subcommittee on that very question. But I think the proof may be in the pudding on that particular one.

Senator **Grassley**. Thank you, Mr. Waller.

Now, Mr. Kilpatrick, I already referred to a statement you made; what do you mean "at the top?"

Mr. **Kilpatrick**. The best example I can give you of that is the request for the grand jury. That comes from the head of the Criminal Investigation Division of the entire Internal Revenue Service, if you went up the ladder and then crossed over, to the head of the Tax Division of the Department of Justice—that is pretty high—that said, "Here is a man that we have had"—10½ pages explaining how they couldn't find any way to deny my investors their deductions. And at the end of the 10½ pages it says, "How to use the criminal grand jury," how to illegally and unconstitutionally use the criminal grand jury. "We can't make this case civilly; we are going to have to do it criminally. Would you give us a grand jury?" Because it must be borne in mind that we are talking about hundreds of millions of dollars, and "Kilpatrick would be a wonderful example to use on the other people who copy him. And we could go out and get hundreds of millions of dollars." They stated what they were going to do in that statement.

For the next 2 or 3 years, they promptly went out and did all of those things; the middle management people went out to do it. When they completed it, they did exactly what they said they were going to do. Initially they said, "We can use the information gathered in the grand jury." They then sent out 70-something middle management investigators to investigate our investors and ask them questions, gathered information that was never presented to the grand jury. It was kept only for the benefit of the civil people, but under the umbrella of the——

Senator **Grassley**. I would like to have the names of those people.

Mr. **Kilpatrick**. Yes, sir; the entire 6-E list. I will get them for you when we get back.

Senator **Grassley**. Mr. Grossman, maybe just a little more elaboration on what you previously said about national patterns, or even any substantiation of what Mr. Kilpatrick said in the sense that you think that is the way things can really happen.

Mr. **Grossman**. My experience is, as a tax and criminal law attorney, one not ought to level charges unless he can stand behind them with tremendous documentation. But I can tell you this: I get a feeling when I walk into a room with prosecutors that I cannot quantify; but I can tell you it scares me, because it raises the hair on the back of my neck at the enormous power they have and sometimes the unsympathetic way in which I think it is going to be used.

Let us talk about immunity for a second. Now, I understand the law to read that there is transactional immunity and use immunity, and that the only way I know to get immunity is to follow the guidelines laid down by you, the Congress of the United States.

When I hear about pocket immunity, I get scared, because you haven't provided for that; it is simply an administrative procedure that is done outside of what I know to be the law. The reason pocket immunity is granted is to avoid statistical evidence to you, our lawmakers, as to what is being done in the nature of prosecutions. Justice publishes statistics, IRS publishes statistics, and those statistics are given to you and this committee.

You want to know how many times the Government makes its case by giving immunity to potential defendants. But you don't know. You don't know the whole story, because pocket immunity is not a statistic given to you; it is unquantifiable. Whereas, immunity given through the courts is something you would have knowledge of and be made aware of.

There is only one check on the awesome power of the Federal Government, and that is you. As I speak to you today, behind me there sit representatives of the Department of Justice, the Internal Revenue Service, who are listening to every word that I say to you. They are extremely concerned with what it is you will do.

I have talked about it with Mr. Kilpatrick and with Mr. Waller hundreds of times. We have had meetings I don't know how many times. This is one of the first times that we have been honored with the presence of such an august group of people.

They are concerned about what you think. They are concerned about what you do. So that, if they follow a pocket immunity pattern where statistics can't be brought to you and you can't be made aware of who gets an immunity in making their prosecutions, it aids them, I think, in trying to pull the wool over eyes, so to speak. And that is not something we should have; we should have a government which is in the sun.

I get an impression, as I wrote in my testimony, that Snyder was wanting Kilpatrick's scalp, although he frequently expressed a willingness to accept another part of Kilpatrick's anatomy. So far as I am concerned, it seems to me that one can't document every inch, every instance of government abuse, but that there is an atmosphere, an arrogance of power which is expressed by those who have it, and it is easy to tell it when you are on the other side of that transaction.

Mr. **Kilpatrick**. I would like to make a comment on that pocket immunity from a layman's point of view. I read somewhere that I think there are 8,000 attorneys in the Department of Justice and the IRS Criminal Tax Division.

Looking at my own case, we know of 23 pocket immunities that they gave out. We know of two instances in which they threatened to revoke the pocket immunity, or there was testimony that they threatened to revoke the pocket immunity, "if you don't do what I want you to do."

Unlike what it is you provided for, never in any of these instances is anything written down.

Senator **Armstrong**. Mr. Kilpatrick, I don't want to interrupt your train of thought, but can you furnish us those two instances?

Mr. **Kilpatrick**. The two instances? Yes, the testimony of that. Yes. It was Mr. Richard Bell, which Judge Winner alluded to yesterday, with his attorney. Sheila Warner, my secretary, was carried in three times—you know, with the possibility of immunity. They didn't like her testimony, so they didn't give her immunity. I might add that there were other instances in which one of the attorneys—I have forgotten which one it was; I think it was Mr. Snyder—was asked how many others he had, and he couldn't remember how many others he had offered his immunity to.

But what I am really concerned with is this: Maybe this would never happen. In this particular case it has never been questioned that I am involved with organized crime or I have hit men, or things of this nature. But here is 8,000 people with the authority to unilaterally say, "OK, I am going to give you my pocket immunity; I am going to stick it right here." What would happen 2 or 3 or 4 or 5 years later when one of those 8,000 has a little problem, and he has got a hit man down here that he has given immunity to? And he says, "Here I stand, boy; I give and I taketh away. I am going to take it away if you don't help me." That would probably never happen; but, my God, that is an awesome power to divest in 8,000 people that you have never seen and have no idea what their morals are now or what they will be in the future, what crises they may be facing where they would need to exercise that power.

If there is no other reason not to do that, not to allow that pocket immunity to continue without a record and without the administerial benediction of the judge to state exactly what they have immunity for that cannot be withdrawn, that would in itself, I think, from a layman's point of view, be a bountiful reason to assure that it is discontinued and ceased right now.

I might also add that for 23 people who were given immunity in my case, 21 of them came to me and said, "Bill, they are offering me immunity. What do you think I should do?" In all 21 cases I said, "For God's sake, take it. Man, they are serious. They are looking at 140 years of my life. Take the immunity and tell the truth. You cannot hurt us with immunity. Good Lord, we have got hundreds of attorneys who have looked at this and said that's exactly what Congress passed the law to encourage us to do. You can't hurt me by telling the truth, and that is all they can ask you to do."

The only two witnesses that ever hurt me were the man that I alluded to earlier and that Judge Winner alluded to yesterday, with four convictions or something of this nature, that had a bountiful reason to say whatever they wanted to hear and promptly did, and a bank president who had confessed to a million-dollar bank fraud for which he got 61 days in plea bargaining, 2 days after he testified for me. I think it is absolutely astounding what you can get in the form of testimony from someone facing 12 years and you offer him 3 hours, of for somebody facing God knows what and you give him 61 days in the honor farm at Yuma, AZ. It is an awesome power to put in the hands of 8,000 young attorneys most of whom come here for training before they go out and practice.

Senator GRASSLEY. I have some questions I am going to submit in writing, and I have to excuse myself to go to the Immigration Subcommittee. Senator Armstrong will continue the questioning and the hearing.

Thank you.

Senator ARMSTRONG. Thank you, Mr. Chairman.

Before I begin to ask my questions of this panel, I would just like to take a moment to check a signal with the witnesses who are scheduled to appear following this panel.

Here is our situation: It is now 20 minutes to noon, and I want to be sure that we don't unnecessarily inconvenience Mr. Vaira and Mr. Russell, who have come here in effect as expert witnesses to talk about the grand jury process. I have a lot of questions. I have a lengthy list of questions I would like of the four panelists now. So, my question is this: What is your travel schedule? Can you continue this afternoon? And Mr. Russell and Mr. Vaira, what is your travel schedule? My desire is just to accommodate everyone the best we can, but I think this is too important to have it cut off at 12 or 12:30. We need to pin this down.

Mr. VAIRA. I have no problem.

Senator ARMSTRONG. I thank you.

Mr. Russell, are you here?

Mr. RUSSELL. Yes, sir; I have to go soon.

Senator ARMSTRONG. I see. What about the panelists?

Mr. KILPATRICK. I have no problem.

Mr. GROSSMAN. I have no problem at all.

Senator ARMSTRONG. Well, this is a somewhat disjointed way to do it. My disposition would be to ask Mr. Russell to come forward, and then we could take whatever time is necessary this afternoon. It isn't my thought that it would take a very long time, but I do have 15 or 20 questions that I would like to raise to explore issues which you have raised in your testimony this morning.

So, if that is agreeable, we will hear Mr. Russell. The panel can be at ease. Then after we are done with Mr. Russell we will come back this afternoon, probably at 2.

Mr. RUSSELL. Thank you, Senator.

Senator ARMSTRONG. Mr. Russell, would you come forward?

Mr. David Russell is president of the National Association of Criminal Defense Lawyers. He is a resident of Kansas City, MO, and practitioner.

Yes, Mr. Vaira, come up, too; although, I think we will just have Mr. Russell speak this morning and get back to you this afternoon, if that is all right.

Mr. VAIRA. That is fine with me, sir. I was not going to read my statement, but I understand you have a number of questions.

Senator ARMSTRONG. Well, I have a number of questions. What I would like each of you to do, if we have an opportunity, is not only to present any thoughts that you came to this hearing with this morning but also reflections about what has been said, either by Judge Winner yesterday or by the persons who have already testified this morning, Mr. Kilpatrick, Mr. Grossman, and Mr. Waller.

So, proceeding slightly out of order, let me just suggest that we take Mr. Russell and invite you to comment in any way you would like to, and then I will ask you to give us your impressions of this matter.

Mr. RUSSELL. All right.

## STATEMENT OF DAVID RUSSELL, PRESIDENT, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, KANSAS CITY, MO

Mr. RUSSELL. Sir, I may be able to rearrange my plans. I appreciate your letting me go ahead, though, and I will see what I can do with the flights.

I am David Russell. I am the president of the National Association of Criminal Defense Lawyers. The National Association of Criminal Defense Lawyers is composed of both private practicing lawyers and public defenders throughout the United States, in excess of 4,000 members.

We are extremely interested in a number of bills that are pending before Congress right now related to the grand jury and the grand jury process, as well as the hearings that are here.

What I would like to do is not repeat what has happened this morning or the statements that have been made this morning in regard to specific cases, or the statements that were made yesterday in regard to specific cases, but talk very generally about a concern of the defense bar that is a concern throughout the United States.

We are concerned not necessarily with reviewing what has happened in a particular case. Our concern is one of preventive medicine.

It is not necessarily a concern for our individual clients; I am not here asking this committee or any other committee to permit us to have more rights for an individual defendant. What we are here to talk about and what we are concerned about in this particular area is the preservation and protection of an existing system, that is, the grand jury system.

We are in favor of the traditional grand jury system. We are in favor of and accept the necessity for secrecy within the grand jury system. We are in favor of having an independent investigative body such as a grand jury which assists a Government agency or a U.S. attorney in a criminal investigation.

However, we are concerned that that be done in a proper manner, in an arms-length manner, and in a way that the Constitution of this country and the citizens of this country are properly protected.

Thus, we recommend a preventive approach, which would, for example, permit the defense lawyer or lawyers around this country to review the grand jury proceedings after a client is indicted or charged with a crime, to make sure that the process was proper and that the U.S. attorney, or whoever it may be that presented evidence to that grand jury, presented it in a proper manner. And that is the main concern. My written statement makes various suggestions regarding some of the bills that are pending before Congress, and I would like to talk a little bit about those.

Before I do, let me tell you the typical scenario that a criminal defense lawyer confronts when he is handling a case in the Federal court system.

I have been practicing law in the Federal courts for about 18 years. I am here as president of an association of lawyers who probably, on average, have practiced in excess of 20 years. More than half of our members practice regularly in Federal court. So, I come here with a great deal of experience, a lot of war stories, but a lot of practical knowledge about what happens in the average case.

Generally, when a defense lawyer appears with his client and has reason to believe that there has been some impropriety in front of a grand jury, or at least wants to be able to check out certain stories that his client or witnesses have told him about the grand jury proceeding, he will raise that question initially with the court. The judge is going to say, "The rules are," under the Federal Rules of Criminal Procedure, and, "the statutes are," under the statutes that have been passed by this Congress, that I cannot get that information unless I can come in with a substantial amount of probable cause to convince the court, in advance, that there has been some kind of violation of my client's rights or some kind of impropriety in front of the grand jury.

Immediately we are placed in a catch-22. We don't get to see the materials to verify what has happened, we only have suspicion, and yet we have a great burden that we have to meet in front of this judge to try to prove to him that there has been some impropriety. And I dare say that 95 percent of the time we are unable to overcome the burden. But the questions arise: Why can't we see the comments that the U.S. attorney made to the grand jury? What is that really violating? Why can't we see the instructions that are given to the grand jury by the U.S. attorney? What right are we really violating? Who are we really hurting to see what the U.S. attorney might have told the grand jury?

Most cases that are presented to a grand jury are presented by summary evidence—that is, where an agent takes the stand and summarizes the case against the defendant, or the target at that time, and gives the grand jury a general overview of what evidence they have. And usually we will have the U.S. attorney say, "Well, we only had summary witnesses." Under the Federal Rules of Criminal Procedure and under the statutes that exist, we are not entitled to get that summary testimony. And yet I ask why. What is it really hurting?

Senator **Armstrong**. When you say "summary testimony," what does that mean? That means that somebody comes in and says, "We have a witness who saw so-and-so commit such-and-such an act"?

Mr. **Russell**. Hearsay evidence is permissible. For instance, an IRS agent will take the stand and say, "We have the following investigation about this particular target. We have examined his financial situation, and here is a summary of the financial situation. We have interviewed other witnesses, and here is a summary of what those witnesses have told us."

Senator Armstrong. I see. In other words, a witness before the grand jury in that setting might summarize in a minute or two what might take an hour or two of actual testimony to present?

Mr. Russell. Yes. And that is permissible.

Senator Armstrong. I understand. But your point is that you would like to have access by defense counsel to the proceedings of the grand jury?

Mr. Russell. To those summaries.

Senator Armstrong. And you are saying that you want that kind of access if, as, and when the indictment is returned?

Mr. Russell. Yes, at the postindictment stage. I agree with the secrecy of the grand jury and the necessity of not hurting people's reputations. If that summary is made and the grand jury chooses not to indict, then it ought to remain secret, and it ought to be closed, and that is all that is necessary.

However, if, because of that summary, an indictment is obtained against my client, then postindictment I think the defense lawyer should have the right to say, "Well, let me look over his shoulder and see if he gave proper evidence to the grand jury."

The response of the court is, "Well, the rules don't allow for that; the statutes do not allow for that; the Jencks Act does not allow for that." And as a result, you don't get it. You are just going to have to take their word for it, unless you have some evidence that they have abused the grand jury system. And then I am back in that catch-22 again.

I would like to ask the Government, if they were sitting at the table with me, why shouldn't I be allowed to see that after my client is indicted? To see whether they followed the rules properly and whether they presented a fair and impartial summary to the grand jury?

Senator Armstrong. Well, Mr. Russell, you can't do that; but I am going to do that on Monday. We will get some kind of an answer.

Mr. Russell. I appreciate that.

And that is the average, typical scenario that we have. Then what will happen is, the court will say, "Well, you haven't overcome your burden. You haven't shown that you have a right to all of the grand jury proceedings, so we are going to follow the Jencks Act literally."

What does the Jencks Act say, 18 U.S.C. 3500? It says that I don't get anything from the grand jury unless that witness testifies at a trial, and I don't get it until after that witness testifies. So, if the Government wants to hold me to the literal statutes, I am then entitled to receive the testimony of that individual after he testifies in the course of a trial. And that is when I start discovering, "My gosh, there have been some real improprieties here; there have been some problems." But I am in the midst of trial. So I make my record.

What happens at the conclusion of the trial? Well, if I am lucky, I win. But there is a good chance I am going to lose the case. And then I am in a situation of going back to the judge and saying, "Judge, do you see what happened in this trial? All those improprieties I was telling you about did actually happen, but it was shown in the course of the trial. So, I would like to have a new trial. I would like to review this."

Now, where am I? I am stuck with the *United States* v. *Mechanik* decision, where the Supreme Court of the United States has said, "Whoops, it is post-trial now. You don't have a right to review that; it is over with. And you have no right to appeal, and you have no right to challenge the grand jury process post-trial." And I have lost my rights. And my client has lost his rights. And it is because of the technical rules that we have to follow, that I feel are unnecessary.

So, that really brings out a couple of very basic issues that I would like for this committee to consider. First of all, the Jencks Act itself. Why it is necessary to put me in that catch-22? Why shouldn't I be able to have all of the grand jury evidence, testimony, argument, presentation, and instructions to the grand jury?

Now, if the U.S. attorney says they have a particular witness that they want to protect—and I agree that there are situations that arise when that is necessary—all the U.S. attorney has to do is go to a Federal judge and ask for a protective order, and I have been involved in many, many cases in which they have asked for protective orders and protective orders have been granted.

So, I would say, rather than putting the burden on us to come forward with the evidence—you see, you don't get any grand jury testimony or anything that happens in front of the grand jury unless you can show some impropriety, or after the individual testifies—I would ask the members of this committee to consider legislation that would say we get it all unless the Government can show a specific instance where it should be kept from us. We can live with that; we have no problem with that kind of a situation.

Senator ARMSTRONG. The long and the short of it is that you want to overturn the *Mechanik* case, and you want to have counsel for witnesses before the grand jury present?

Mr. RUSSELL. First of all, I am talking about doing away with the necessity of the Jencks Act. Second, we do recommend overturning the *Mechanik* case, to give us the right to perfect a record and eventually appeal in the event that the district court would disagree with us.

And then, you are correct, the third area would be to have counsel in the grand jury room, which I think would further protect the right of an individual and also give us the opportunity to look over the Government's shoulder.

I am skipping a little bit, but I am trying to answer your question. We are not asking that if an individual has his lawyer in the grand jury, that that lawyer become an advocate before the grand jury. We accept the present suggestions, for instance in H.R. 1407, that say that the lawyer can't say anything—he can't object, he can't make any arguments, he can't present evidence. All we are doing is saying let the lawyer be there to make sure that his client is not badgered, that the Government doesn't make improper innuendo or statements to the grand jury which would be misleading.

Senator ARMSTRONG. Can I shoot you a bunch of specific questions?

Mr. RUSSELL. Please.

Senator **Armstrong**. These are designed, really, to elicit your opinion about the overall situation. And what you have said about the *Kilpatrick* case and the *Omni* case exactly mirrors my own interests. I am only secondarily interested in these specific cases and these specific defendants; what concerns me in my legislative responsibility is to determine to what extent if any these abuses are widespread, whether or not they are a pattern, whether or not legislative changes are needed, whether or not the proposals that you and others have endorsed should be enacted, whether or not the Department of Justice and the IRS is managing their business in a way that safeguards the rights of citizens.

So, it is really helpful to me if I can just seek your advice about it. Let me start with this:

I mentioned in my opening remarks yesterday, and someone has again quoted today, a passage out of a Supreme Court decision in which the role of the law enforcement officer before the grand jury is discussed. It is this notion of a vigorous prosecution striking fair blows but not foul blows, of not being so one-sided that they neglect to defend the rights of citizens who have business before the grand jury.

My question is this: Mr. Kilpatrick and some of the others who have testified give me the impression that there is a widespread attitude on the part of prosecutors to ignore that, that they see their job is to get people indicted and to get them convicted, and they are not very scrupulous about the other part of their responsibility.

What is your experience? Is that true?

Mr. **Russell**. I think it is true. The problem I am having, and I heard your earlier questions, is giving you a number or a list of cases—United States versus So-and-so.

Senator **Armstrong**. I understand. But at this point I am approaching you a little differently than I did the others, because, just for the record, you have no connection with the *Kilpatrick* case or the *Omni* case.

Mr. **Russell**. That is right.

Senator **Armstrong**. You are simply here in your capacity as a leader of a professional society that is expert in this matter. I am just asking your opinion, out of 18 years of this kind of practice, and as the person who is the president of the National Association of Criminal Defense Lawyers. What do you think, just drawing on your opinion?

Mr. **Russell**. I think I can say, from that experience, that it is widespread, that 75 to 80 percent of my cases are presented to a grand jury by summary witnesses.

I think that this fact, in and of itself, raises a real question in my mind about whether those were fair and impartial summaries, or whether that agent has become such an advocate that maybe he is leaning much more favorably to the State rather than giving the entire evidence.

Senator **Armstrong**. Do you agree with the suggestion that one of the witnesses made that prosecutors who take cases to the grand jury virtually see their own personal credibility at stake in getting an indictment? Are they laughed at back at the office if they don't get an indictment from a grand jury?

**Mr. RUSSELL.** I think they are laughed at at the office if they are not a successful U.S. attorney, which means getting an indictment, prosecuting that indictment, and obtaining a conviction.

**Senator ARMSTRONG.** Did you ever hear anybody say that they could get a grand jury to indict a ham sandwich, or something similar?

**Mr. RUSSELL.** Numerous times.

**Senator ARMSTRONG.** Numerous times?

**Mr. RUSSELL.** Numerous times.

**Senator ARMSTRONG.** In other words, that is a common attitude, that if a prosecutor really wants to get an indictment out of a grand jury he can probably get it?

**Mr. RUSSELL.** I am sure that outside this committee I could talk to any U.S. attorney I have ever dealt with, and he will tell me over a cup of coffee that he can get an indictment against just about anybody for just about anything.

**Senator ARMSTRONG.** How about pocket immunity? That has been suggested as a flagrant and widespread abuse. Defense counsel who have spoken previously just said that it is very widespread, that nobody knows how widespread it is, that it isn't written down, that there aren't even letters written in a lot of cases. Does that square with your experience?

**Mr. RUSSELL.** Yes. I can think of three different jurisdictions, Federal jurisdictions that I have practiced in personally, in which the U.S. attorney has proposed pocket immunity. My position has always been that it is improper, you can't do it, there is no statutory provision, and I won't go along with it. However, they say it is a regular practice in their office to do it.

**Senator ARMSTRONG.** Are you saying that Congress should either—well, what are you saying? What would you suggest? Rather than my leading you, tell me what we should do.

**Mr. RUSSELL.** I think the present immunity situation is sufficient and that pocket immunity is improper. I see nothing wrong if they are going to immunize someone by going through the existing procedure for doing it.

**Senator ARMSTRONG.** Suppose I came to agree with that? What should I do about it? I mean, let us just suppose that after looking at it I came to the conclusion, "Yes, that is right; we ought to put a stop to it"? How do I do that?

**Mr. RUSSELL.** Then I would suggest that the present immunity statutes clearly state that that is the only type of immunity that is acceptable in Federal jurisdictions.

**Senator ARMSTRONG.** Do you mean amend it to do so, or that it already says that?

**Mr. RUSSELL.** I think it already says that; but, there are some Federal judges that may disagree with that. I know there are numerous U.S. attorneys who would disagree with that.

**Senator ARMSTRONG.** Well, you see, here is my problem. Let us suppose that I come to the conclusion that you have just stated. I am not a judge, I am not a lawyer, I am a Senator. What do I do about it? And I don't want to make a career of this; I want to settle it and get on to other matters. What do I do?

Mr. RUSSELL. Then I would suggest to make it very clear there should be an amendment in 6001 and 6002 specifically stating that this is the only type of immunity that can be granted.

Senator ARMSTRONG. Would it be an imposition to ask you to draft such a thing and send me a letter when you get back to Kansas City?

Mr. RUSSELL. I would be happy to. I have my legislative director here with me.

Senator ARMSTRONG. Good deal. I don't know whether or not I do agree with that, but I think I probably do.

One of the suggestions that has surfaced over and over again, very strongly in Mr. Kilpatrick's testimony and also in the observation I believe of Mr. Grossman, is that what we are really seeing here in the *Kilpatrick* case, and maybe in the *Omni* case as well, is the prosecutor trying to intimidate people who are engaging in practices which the IRS or the Justice Department or somebody disapproves of. And the implication of what they are saying is not so much that "we are going to get a conviction," or, "if we do, that is our main purpose," but it is to scare everybody out of this business. Do you have any comment about that? Then, related to it, what do you think of the notion that was suggested of separating the criminal prosecution functions from the civil tax collection functions of the IRS?

Mr. RUSSELL. In answer to the first part of the question, I can think of several instances where I have seen a prosecutor, in a rather arrogant fashion, intimidate witnesses. I have seen witnesses that I have represented personally, where I have had to wait in the hall outside the grand jury room and watch the U.S. attorney bring my witness out literally yelling at him about what he is doing and intimidating him, and telling me that if I don't get the client straightened out that he will end up being the target of the grand jury.

Senator ARMSTRONG. That isn't exactly what I was getting at; although, I am glad you brought that out, because I think it is pretty clear from what Judge Winner said and others, that in the *Kilpatrick* case, at least, the personal conduct of some of the Government attorneys wasn't very good, that they were abusive and, well, that they clearly were not on good behavior. But that wasn't my point.

Mr. RUSSELL. I am sorry.

Senator ARMSTRONG. My point was this: Mr. Kilpatrick said and I think Mr. Grossman made the point that the reason for bringing the case, even when they might have some knowledge that they weren't going to get a conviction or that it was a shaky case, or whatever, was not so much the effect on the people who were being prosecuted but on everybody else—in other words, trying to make an example of them. And that ties in with this notion of sending out thousands of letters to clients, and in another episode which came to my attention, which is not presently before us, a similar situation, sending telexes to the customers of a firm. In other words, it is alarming to contemplate that the Government would attempt to enforce an opinion about a business practice that was not against the law, which was apparently the fact in the *Kilpatrick* case, through criminal prosecution. In other words, just to scare everybody out of a business which was otherwise lawful. Is that something that I should be concerned about, or is that really far-fetched?

**Mr. Russell.** I think it is something you can be concerned about. I have a client right now in a very similar situation as Mr. Kilpatrick, that has been investigated for 3 years, who is unemployed, and his company is gone—and it is an IRS investigation—because they have gone to all of his clients and interviewed all of his clients, stating that he is involved in a criminal investigation. I not only have had to represent him in that investigation but I am having to defend him in a number of lawsuits that are being filed by those clients, who are claiming that he must have defrauded them because that is what the Criminal Division of the IRS is saying.

**Senator Armstrong.** Well, I don't want to get off into an intellectual cul de sac, but I can't resist asking what is going to happen in that case, if in fact it goes to trial and like Mr. Kilpatrick your client is exonerated? He will then have been put out of business, I guess.

**Mr. Russell.** He is broke now.

**Senator Armstrong.** So, how does he ever get justice? Can he sue the Government?

**Mr. Russell.** I have explained to him that the only way he will obtain justice is either not to be indicted, if we can convince him, or, if he is indicted, to win the case, and that is the best he is going to do.

**Senator Armstrong.** Well, how will he get back his attorneys fees?

**Mr. Russell.** He won't.

**Senator Armstrong.** How will he get back the loss of income as a result of this prosecution?

**Mr. Russell.** Under present law, he can't.

**Senator Armstrong.** Should he? Could we write a statute that would do that without unduly hamstringing the prosecutors?

**Mr. Russell.** I think you could, yes.

**Senator Armstrong.** Has anybody attempted to do so? Has a model statute been suggested, or has anybody in your association done anything along those lines?

**Mr. Russell.** Not to my knowledge.

**Senator Armstrong.** Generally, you are sympathetic with the idea, however, that people who are sued by the Government or who are prosecuted by the Government should have the right to sue for some kind of recovery of something?

**Mr. Russell.** I think that is something that would be excellent. To be real honest with you, though, I am not sure, even if such a statute were passed, that that could remedy the problem. You know, I have been involved in a lot of cases that I have won and my client wanted to sue somebody, and there just wasn't anybody to sue, or his case was not very sympathetic in front of a civil jury.

What I would beg this committee and similar committees to do is try to give us the tools for preventive medicine to stop this sort of thing, if it is improper in the first place.

**Senator Armstrong.** All right, fair enough.

**Mr. Russell.** Now, let me answer the second part of your previous question.

**Senator Armstrong.** You want to separate the criminal prosecution from the civil tax collection function?

**Mr. Russell.** Yes, sir. I definitely think that we now have a situation where the IRS, specifically, is wearing two hats. I mean, they are threatening clients on a regular basis with criminal prosecution. At the same time, they are trying to settle civil cases.

Now I have found—and I know it is not appealing—in drug investigations, I have several situations that I am aware of, not just where I am representing the people but others are, where the IRS is wearing a third hat, and that is as a DEA agent.

There has to come a point where we say that there are civil remedies, there is a necessity for collecting civil taxes, and maybe fraud penalties, or whatever may come out of that. But that ought to be separated from a criminal investigation.

**Senator Armstrong.** Do you have any suggestions as to where that function ought to be put? Or does it matter?

**Mr. Russell.** I think that the FBI is more than effective. They have some of the best financial experts I have run up against, in the FBI, oftentimes more qualified than some of the IRS agents that I have run up against.

**Senator Armstrong.** Mr. Kilpatrick suggests, among other things, correction will require congressional supervision, and his proposal, with respect to Government employees or lawyers who are abusive, he suggests a special prosecutor be empowered to reduce ratings, dismiss or suspend from Government service, request appropriate actions from bar associations and, in instances of flagrant acts, criminal prosecution. Do you share that notion?

**Mr. Russell.** I share that notion. I don't think statutes are necessary. I would hope that if we enforce the existing statutes and law and ethical conduct of lawyers, for instance, we would be able to do that.

**Senator Armstrong.** Judge Winner mentioned, and also Mr. Grossman mentioned this morning, that the OPR evidently conducted a review of the conduct of the prosecutors in the *Kilpatrick* case, and, hearsay, they found no wrongdoing on the part of Mr. Snyder and the others. And yet, according to what Judge Winner said, he was never contacted, and that is apparently what Mr. Grossman said and what Mr. Kilpatrick said.

Suppose we find out that is true? I mean, I am going to ask the Justice Department about that when they come around on Monday. I am going to say, How in the world could you have that kind of a professional review and not contact them?

Suppose we find that is true, and suppose we find out—I am just supposing, because I don't know—that the present system of professional review isn't working? What should we do about it?

**Mr. Russell.** I think that it may be simply a question of forcing the review entities to better regulate themselves and perhaps requiring them by regulation to have all interested parties available, or at least put on notice. I am not sure it is necessary for a statute to be enacted to do that.

**Senator Armstrong.** In other words, you think that is something that the Attorney General ought to do?

**Mr. Russell.** Yes.

Senator **Armstrong**. The OPR is a creature of the Attorney General, as I understand it.

Mr. **Russell**. Yes, sir.

Senator **Armstrong**. What if he doesn't do that?

Mr. **Russell**. Well, I guess we reach a stage where maybe a statute would be necessary.

Senator **Armstrong**. Here is the part that is frustrating about it. I wrote down on one of these notes I am making that somebody said, "circle the wagons." Somebody said what happens is that the bureaucracy circles the wagons and protects their own. And in general, I think that is very true. I don't know whether it is true in this specific case, although there seems to be a lot of indication that it is. In the *Omni* case there seems to be some indication that that is exactly what happened, and certainly that is consistent with my own day-to-day experience, that, by gosh, if you get in contact with any bureaucracy, whether it is the Justice Department or the Congress or the Senate Finance Committee, or the Pentagon, or whatever it is, maybe even the National Association of Criminal Defense Lawyers, I don't know, and try to hold them accountable, the tendency is to close ranks and say, "By gosh, that is none of anybody's business outside."

That is why I was asking. You have told me what I want to know. You think it ought to be handled by OPR and they ought to do their job, and I guess I am just asking you to think with me about what happens if that is not the case.

Mr. **Russell**. They are going to have to have some outside independent review.

Senator **Armstrong**. Well, let me ask you this. I don't want to lead you into something you don't want to get into, but I am just seeking your help here.

On Monday the Justice Department is going to come over, and among the things I am going to ask them is:

> What did you do in the case of Jake Snyder, who yelled at the judge, who bragged that he didn't know what he was doing, who said he was going to make his reputation?—according to what has been presented here. I don't know any of this; this is just what counsel and defendant and judge have told me about this. Now, exactly what did you do? And did you conduct a professional Review? Did you talk to the judge and the others who were in the courtroom when these acts took place? Did you talk to people who were in on the grand jury procedures?

If I don't get a satisfactory answer, then what do I do next?

Mr. **Russell**. Well, if I were in your shoes I would say, "Then, you are going to require us to consider the possibility of having some type of oversight from an objective party who is going to observe and review your procedures, since you are not taking care of it." And I would be happy to volunteer to do that, or anybody from my organization, I am sure.

Senator **Armstrong**. We accept, with appreciation.

One of the problems we have got here, as I said yesterday, is that I am not disposed to or equipped to play cops and robbers here; this is just a problem that came to my attention.

Mr. **Russell**. Yes, sir.

Senator **Armstrong**. And since it did, I just want to solve it and get on to other things.

Let me ask this: As an attorney who is regularly involved with these kinds of cases, does it seem surprising to you that the Department of Justice would assign to the prosecution of a case of this type someone who is not familiar with tax law?

Mr. **Russell**. Yes.

Senator **Armstrong**. Could you take a minute and just explain to me how this reviewer process works? I am going to come back to that with Mr. Grossman, since he made a big issue of it, but I guess I don't exactly understand what a reviewer is and what standard of ethical conduct and behavior we should expect from a reviewer.

Mr. **Russell**. I probably ought to let Mr. Grossman elaborate a little bit more, since he is here in Washington and I am in Kansas City; but I will express what I understand the reviewer to be.

I am not sure that there is a set procedure, that certain things are required. However, a reviewer is an individual, generally here in Washington, that you have sort of a final opportunity to talk to before your case is concluded in the eyes of the IRS. He is supposed to be an individual that you can sit down and discuss very openly with, and he is supposed to be objective enough to listen to what you have to say, and you can discuss what your defenses are, in the case of Mr. Grossman, or what your arguments are that would try to convince him that you should be able to win your case eventually, and that maybe this thing should be finally reviewed in a more objective manner.

Senator **Armstrong**. The reviewer is a person who works for, in this case, the IRS, or for the Department of Justice?

Mr. **Russell**. The IRS, as I understand it, am I right? Mr. Grossman will correct me.

Mr. **Grossman**. No, no, no. The reviewer is with the Department of Justice.

Mr. **Russell**. The Department of Justice.

Senator **Armstrong**. In other words, that is somebody that the Justice Department sends out kind of just before they ask for an indictment, I guess, in this case, to take a fresh look at it and talk to the people who have been bringing the case before the grand jury, and talk to the defense counsel, and take a last look at it.

The implication of Mr. Grossman's remarks this morning—he didn't exactly say this, but the interpretation I put on it—was that the reviewer was expected to be impartial, not to have a vested interest in the Department's case, to take a look at it and say it either looks like it is a good case, or, "You are going off the deep end." And for that reason, defense counsel would routinely disclose whatever they had in an attempt just to shut it off right then and there?

Mr. **Russell**. Right.

Senator **Armstrong**. Would it be improper or would it be violating the custom or tradition of this process for that to be a person who in fact was not impartial, who did have an axe to grind, who did have a vested interest in it, who maybe was a part of the prosecuting team?

Mr. **Russell**. Well, of course. In Mr. Grossman's situation, if you have a reviewer who is just sitting there trying to get information out of you with no intention of really reviewing it, so that he could turn that information over to another U.S. attorney who was going to be prosecuting the case, that denigrates the entire system and the purpose of having a reviewer.

The purpose of a reviewer is to decide whether or not that case should be sent back to the individual jurisdiction for a criminal case to be filed, to make that decision first and not to assist in the filing of that case.

Senator ARMSTRONG. Mr. Grossman made the point that his client Declan O'Donnell was summoned before the grand jury even after he had written a letter, as O'Donnell's counsel, saying, "Nothing doing; we are not going to appear before the grand jury," and that he, Mr. Grossman, was never notified of that until it happened.

Should I be concerned about that? And if so, is that something that has happened frequently in your experience, or is that an unusual event?

Mr. RUSSELL. Well, clearly that is an impropriety. I think once the U.S. attorney is put on notice that you represent an individual, he has an obligation to keep you advised as the attorney and representative of that individual.

I personally have not had that situation happen. I have heard situations where that has happened. More often, I have heard several situations where the agent goes out and tries to talk to your client in spite of the fact that he knows that you represent the client, without a subpoena. And that has happened several times that I am aware of.

Senator ARMSTRONG. I think you have already indicated that abuses of this kind are not uncommon. I am not sure if I asked you directly whether or not you agreed that it was a pattern, or whether or not, as Mr. Grossman and Mr. Kilpatrick have said, there are frequent evidences of arrogance and callousness on the part of the Government. I think you have already said that.

Mr. RUSSELL. I would agree with all of the statements made by my previous colleagues and by Mr. Kilpatrick.

Senator ARMSTRONG. Let me ask you this. I am now going to turn to the observations of Mr. Waller and again just ask if you will tell me what you think. I am not asking you to prove it or cite cases but, just out of your experience, whether you agree.

Mr. Waller expresses a concern that to a large extent grand juries are merely a rubberstamp. That is exactly what he said. Is that true? Do they have the kind of independence that is contemplated in our traditional concepts of grand juries?

Mr. RUSSELL. I don't think so. I think that most of the time they are a rubberstamp.

Senator ARMSTRONG. Did you hear Mr. Waller's discussion of what happened when the reviewer in the *Omni* case was, in effect, saying to the prosecutors that he didn't think they had a criminal case? Do you recall what he said about that?

Mr. RUSSELL. Yes.

Senator ARMSTRONG. That, 3 days later, the reviewer was presented with what he termed manufactured evidence, and then they went ahead and prosecuted the case.

If that is true, what should the Department's attitude be? I mean, if that is true—we don't know whether it is, but that is what we are told—if that is true, what does that say not only about the person who manufactured the evidence but also about the review process itself?

Mr. **Russell**. Well, I think we need the review process. But in that particular situation I think there is no excuse for it. In my opinion as a lawyer, it is unethical, it is improper, and perhaps even illegal.

Senator **Armstrong**. Well, Mr. Russell, I am grateful to you. I have got several dozen notes, but I think the main issues that I wanted to ask you about we have covered. I am going to go back fairly carefully with Mr. Kilpatrick and Mr. Grossman and Mr. Waller, and Mr. Vaira—am I saying your name right?

Mr. **Vaira**. No, sir; it is as "Vyra."

Senator **Armstrong**. Thank you. I apologize.

We will do that this afternoon. If your plane for Kansas City is at National, and if you leave almost at once, you will catch it.

Mr. **Russell**. Thank you very much, Senator. I appreciate the opportunity to come here.

Senator **Armstrong**. We are grateful to you for doing that.

[Mr. Russell's written prepared testimony follows:]

National Association of
Criminal Defense Lawyers

# STATEMENT OF

DAVID W. RUSSELL

PRESIDENT

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF THE INTERNAL REVENUE SERVICE

COMMITTEE ON FINANCE

UNITED STATES SENATE

JUNE 20, 1986

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## Introduction

Mr. Chairman and distinguished members of the Subcommittee, my name is David W. Russell, and I am President of the National Association of Criminal Defense Lawyers. I am deeply appreciative of the opportunity to appear before you today to present testimony on behalf of the Association regarding investigative and prosecutorial abuses in IRS tax cases and what can be done to bring the situation under control.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, voluntary bar association comprised of over 4,000 lawyers and law professors, most of whom are actively engaged in defending criminal prosecutions and individual rights. It was founded 26 years ago to promote study and research in the field of criminal defense law, and to encourage the integrity, independence and expertise of criminal defense lawyers. Throughout our history, we have worked to protect the rights and liberties of those accused of criminal offenses, and to promote the proper administration of justice. We have pursued these goals through a variety of educational and public service activities, including national training programs, publications, committee activities, legislative action, and by appearing as amicus curiae in significant criminal justice cases.

We appreciate and share the Subcommittee's deep concern over the kinds of investigative and prosecutorial abuses which occurred in the cases of United States v. Kilpatrick, 594 F.Supp. 1324 (D.Colo. 1984) and United States v. Omni International Corp., (D.Md. May 15, 1986). We heartily commend the Subcommittee's interest in pursuing aggressive oversight in such situations. It is our position, however, that, particularly with regard to abuses occurring before the grand jury, oversight alone is not enough. A legislative solution is necessary, and I would like today to suggest the following elements of any such solution:

1) Create strong and effective sanctions for violations of procedural rules and constitutional rights before the grand jury, to overrule the Supreme Court's decision in United States v. Mechanik, 38 Cr.L. 3122 (Febraury 25, 1986);

2) Not only preserve, but strengthen, the principles of the Supreme Court's decisions in United States v. Baggott, 463 U.S. 476 (1983) and United States v. Sells Engineering, Inc., 463 U.S. 418 (1983), governing grand jury secrecy and disclosure to non-criminal attorneys for the Justice Department and other Federal agencies such as the Internal Revenue Service.

3) Permit grand jury witnesses to be accompanied by counsel in the grand jury room.

4) Amend the Jencks Act to permit earlier discovery of grand jury testimony of prospective trial witnesses.

## The Mechanik case

There is a temptation, upon reading a case such as the Kilpatrick case, to say that, as horrendous as the governmental abuses were, at least they were found out, and a remedy was available through the courts. The sanction of dismissal was granted, and one might hope that this would persuade the IRS and the Justice Department to clean up their act.

However, Mr. Chairman and members of the Subcommittee, if the Kilpatrick case were decided today, no relief would be available--no contempt, no dismissal of the indictment, whether with or without prejudice.

The reason for this remarkable result would be the Mechanik case, where the Supreme Court held that any violation of procedural protections before the grand jury is automatically rendered harmless and irrelevant once the defendant has been convicted by a petit jury. The Court was quite candid about the Catch-22 situation it was creating for defendants, noting that "although the defendants appear to have been reasonably diligent in attempting to discover any error at the grand jury proceeding, they did not acquire the transcript showing [the error] until the second week of trial." 38 Cr.L. at 3123. The Court continued that:

> Although we do not believe that the defendants can be faulted for any lack of diligence, we nonetheless hold that the supervening jury verdict made reversal of the conviction and dismissal of the indictment inappropriate. Id.

No analysis of the egregiousness of the violation or the extent of actual prejudice is necessary; the conviction automatically purges any and all taint. As the Court stated, in language that suggests no distinction between violations of the Federal Rules of Criminal Procedure or constitutional rights:

> Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt. Id.

(The Mechanik Court did note in a footnote that, under its recent decision in Vasquez v. Hillary, 38 Cr.L. 3060 (January 14, 1986), dismissal of the indictment would remain appropriate where there had been racial discrimination in the composition of the grand jury, but stated that the considerations compelling such a rule "have little force" outside of that context. Id. at 3123).

Judge Kane's decision in the Kilpatrick case assumed the same procedural posture as the Mechanik case--that is, a post-conviction motion to dismiss the indictment. After Mechanik, his extensive findings that the case involved "an IRS investigation out of control" which worked "a significant and prejudicial deprivation of these defendant's constitutional rights to due process of law and personal liberty" would have been entirely academic. Indeed, it is unlikely that either he or Judge Winner (575 F.Supp. 325 (1983)) would have bothered to initiate any inquiry into the alleged abuses at all. The conviction would have remained intact, and the world might never have learned of what Judge Kane held to be "numerous violations of Rule 6(d), . . . numerous violations of Rule 6(e) . . . the use of 'pocket immunity' in violation of 18 U.S.C. 6002 and 6003 . . . violations of the Fifth Amendment . . . the knowing and deliberate presentation of misinformation to the grand jury and mistreatment of witnesses . . . [and] violations of the Sixth Amendment." 594 F.Supp. at 1353. As both Justices O'Connor (joined by Brennan and Blackmun) and Marshall recognized, the natural and inevitable result of Mechanik would be for judges to avoid ruling on such motions altogether, confident that the petit jury verdict will take care of the issue quickly and simply: "If the jury convicts, the motion is denied; if the jury acquits, the matter is mooted." 38 Cr.L. at 3125. See id. at 3126.

As Justice Marshall observed in dissent, the Court's opinion reduces the grand jury safeguards of the Federal Rules of Criminal Procedure to "pretend-rules." Id. at 3126. Even Justice O'Connor expressed an unusually strong criticism in her concurring opinion that the ruling "effectively renders those rules a dead letter." Id. at 3124. As Justice Marshall added, defendants have no choice about receiving grand jury transcripts in the midst of trial: their "only access to grand jury materials is likely to be through the medium of the Jencks Act," under which disclosure does not take place until after trial has begun, after direct examination of the witness in question, "and then only on a piecemeal and incomplete basis." Id. at 3126.

NACDL strongly urges the enactment of legislation to overrule the Mechanik decision. There is no reason to doubt that Congress intended the rules it enacted to be enforceable. See part II-A of Justice Marshall's dissent, id. at 3126. Indeed, a preference for the sanction of dismissal has been evidenced not only by the Congress, id., but also, consistently, by the federal courts, see U.S. v. Lill, 511 F.Supp. 50, 58 (S.D. W.Va. 1980) (collecting federal cases), and state courts as well. See 23 A.L.R. 4th 397 (1983).

The restoration of meaningful sanctions for violations of Rule 6 is now absolutely essential, in order to vindicate the protections established by Congress. Justice Marshall has stated that:

> The only way to allow even minimally effective enforcement of those rules is to reverse the convictions of defendants whose indictments were tainted by Rule 6 violations.

38 Cr.L. at 3127. He observed that the proscriptions of Rule 6 are short and simple, and that violations are rare, likely to go undetected by defendants, and easy to avoid by any competent prosecutor.

In this regard, I would also call the Subcommittee's attention to a resolution expected to be considered and passed in August by the full House of Delegates of the American Bar Association. The proposed resolution responds to the Mechanik case by calling upon Congress to enact legislation "to create sanctions for violations of Rule 6 of the Federal Rules of Criminal Procedure." The resolution and the accompanying report of the ABA's Criminal Justice Section have been furnished separately to Subcommittee staff.

If the Congress were reluctant to adopt the type of flat, per se rule of dismissal urged by Justice Marshall, it might wish to consider establishing a more restrictive triggering event for the dismissal sanction, such as a "substantial failure to comply" (the standard utilized in section 1867 of title 28, governing dismissal of an indictment for error in the selection of either the grand or petit jury) with the procedural rules or of constitutional guarantees. This would preclude dismissal where the violation was of no possible consequence--for example, in the Rule 6(d) context, "brief intrusions on the proceedings during which no testimony is taken nor questions asked nor statements made about the case by grand jurors such as the delivering of a note to the prosecutor by his secretary or the repair of a switch by a maintenance man." United States v. Pignatiello, 582 F.Supp. 251, 254 (D.Colo. 1984).

We would caution that no showing of actual prejudice flowing from the grand jury defect should be required for dismissal of the indictment, as was suggested by the "harmless error" analysis in Justice O'Connor's concurring opinion. Such a requirement would necessitate disclosure of the entire grand jury record before trial, and would result in the need for lengthy pre-trial proceedings scouring the record for traces of taint. Such a detailed detour would be likely to impede significantly the swift administration of justice, and would accomplish little that could not be accomplished by use of a "substantial failure to comply" test.

## The Baggott and Sells cases

It does not appear that the Government is at all contrite about its behavior in the Kilpatrick or Omni cases. Having been caught with their hand in the cookie jar, their response is not to apologize, or to take steps to ensure that it will never happen again. Their position remains to deny that any abuse occurred--even though (as Judge Kane found on several occasions in the Kilpatrick case) the abuse is plain on the face of the grand jury record--and in the alternative, to take a "So what--nobody's perfect" attitude. As stated in a Government Memorandum in the Kilpatrick case, cited at 594 F.Supp. at 1343:

> Just as there has never been a perfect lawyer, a perfect judge, or a perfect trial, so there has never been a perfect investigation. Contrary to what one might expect, in view of the defense allegations, the transcripts of the grand jury proceedings do not reveal any conduct whatsoever by the prosecutors seeking to overreach or override the independence of the grand jury.

Indeed, far from expressing any contrition or regret, the Government has proposed legislation to tear down many of the walls they were caught scaling in the Kilpatrick and Omni cases. The legislation, drafted by the Justice Department (the Senate version is S. 1676), would overrule the Supreme Court's 1983 companion decisions in the Baggott and Sells cases. It has been the subject of hearings before both the Senate Judiciary Committee, on November 19, 1985, and the House Judiciary Subcommittee on Criminal Justice, on June 4, 1986.

As this Subcommittee is no doubt aware, the Sells Court held that Rule 6(e) and the fundamental purposes and policies of grand jury secrecy prohibit the automatic, unsupervised disclosure of grand jury materials by the prosecuting attorney to civil attorneys in the Justice Department; such attorneys must proceed by way of a court order, supported by a showing of particularized need. And the Baggott Court, futher construing Rule 6(e) in the context of an IRS administrative proceeding to determine tax liability, held that no disclosure was available where "the IRS's proposed use of the materials is to perform the nonlitigative function of assessing taxes rather than to prepare for or conduct litigation." 463 U.S. at 483.

S. 1676 would permit virtually automatic disclosure between Justice Department criminal and civil attorneys, and would greatly reduce the standard governing disclosure to other Federal agencies, from the current "particularized need" to a test of "substantial need." Its goal is precisely the kind of free intragovernmental sharing of grand jury materials--and its effect would be precisely the kind of warping of the grand jury's criminal priority to civil purposes--that was so dangerous and so soundly condemned in the Kilpatrick case. As the Sells Court stated, and as Judge Kane observed had happened in the Kilpatrick case:

> [B]ecause the Government takes an active part in the activities of the grand jury, disclosure to government attorneys for civil use poses a significant threat to the integrity of the grand jury itself. If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely.

463 U.S. at 432. Indeed, the Kilpatrick case appears to have started as a civil tax investigation, which was turned over to the Justice Department for grand jury investigation when the IRS felt that its administrative processes had become "potentially ineffective," 594 F.Supp. at 1333, leading Judge Kane to conclude that "the record confirms that the grand jury's extraordinary powers and resources were, in part, initiated and channeled for just such a [civil] purpose." Id. at 1332.

NACDL recommends not simply that Baggott and Sells should be left alone, but that they should be strengthened. Mandatory dismissal of the indictment--with or without prejudice, depending on the egregiousness of the violations--along the lines I have suggested in my discussion of the Mechanik case, would remove any doubt in prosecutors' minds as to the consequences of their conduct. Indeed, in the Kilpatrick case, the prosecutor himself admitted that he had knowingly committed a Sixth Amendment violation in the interrogation of a officer of a defendant corporation; the court observed that he had done so

> firm in the belief that, if he committed a constitutional violation of the type identified in Massiah, the only likely sanction was the suppression of evidence in the government's case-in-chief. In the prosecutor's words, "no indictment has ever been dismissed because of [a Massiah violation]."

594 F.Supp. at 1342.

We would suggest further that it is unconscionable to respond to such purposeful and systematic prosecutorial abuses as are found in both the Kilpatrick and Omni cases without some sanction, such as contempt, directed personally at the offending prosecutor or IRS agents. Dismissal alone burdens the Justice Department, but not its renegade agent; in fact, it could be said that, in the case of an otherwise meritorious prosecution so badly botched as to require dismissal with prejudice, society itself and the administration of justice are the losers. Congress should ensure that the wrongdoers themselves, who have betrayed their public trust and brought shame upon their government, cannot watch unpunished from the sidelines while other government attorneys labor to salvage the case.

## Counsel in the grand jury room

Mr. Chairman, the single most promising means of preventing recurrences of the kind of abuses found in the Kilpatrick case is to permit witnesses before the grand jury to be accompanied by counsel. If attorneys knowledgeable in grand jury procedures had accompanied their clients before the grand jury in that case, the entire sorry parade of abuses found there would probably have been nipped in the bud. Likewise, in the Omni case, the similar pervasive abuses revealed there in a pre-trial evidentiary hearing context are likely to have tainted the grand jury proceedings as well, particularly in light of the fact that the abuses condemned by the Omni court were taking place during the time that the grand jury was considering the case. Indeed, subsequent to the Omni court's May 15 decision, on which an appeal is now pending, defendants have filed a well-substantiated, 39-page motion to dismiss the indictment because of abuse of the grand jury process.

A measure allowing counsel in federal grand jury rooms, as well as making numerous other grand jury reforms, is currently pending before the Senate Judiciary Committee (S. 284, by Senator Levin), but has been languishing unattended due to lack of interest during this Congress. A companion House measure (H.R. 1407, by Representative Conyers) has been the subject of extensive hearings before the House Judiciary Subcommittee on Criminal Justice, and is expected to be marked up by the Subcommittee within the next few weeks.

In our view, the indispensable centerpiece of such legislation is the provision for counsel in the grand jury room. At every critical stage of the criminal justice process other than the grand jury stage, a person who desires the assistance of counsel is entitled to it, under a broad array of decisions handed down in the last quarter century. The prohibition against counsel in the grand jury room dates back to a time when none of these guarantees existed; it is the last relic of a bygone era, when grand juries were still thought to possess some capacity for independent judgment, the better to serve as a buffer between the government and the individual, and were valued for their role as a "shield" for the innocent as well as a "sword" for investigating crime. It is now time for the grand jury to catch up to the rest of the criminal justice system.

This is a position emphatically shared by the ABA, the American Law Institute, NACDL, the National Lawyers Guild, and the legislatures of seventeen states. I would suggest that it is unlikely that this coalition, spanning the entire criminal justice spectrum--prosecutors and defense lawyers, Republicans and Democrats, judges and law professors--would band together to support a measure which would have any adverse effect on the enforcement of this Nation's criminal laws.

Actually, allowing counsel in the grand jury room is a change more of form than of substance. Witnesses already have a general right to have counsel present outside the grand jury room, and to step out from time to time (but not too often, says In re Tierney, 465 F.2d 806 (5th Cir. 1972)) to consult with counsel. Thus, the question is not so much whether a witness may consult with counsel, but how.

The present "how" is fraught with problems. When a witness leaves the grand jury room to consult with counsel, it takes time--including time to brief the lawyer on the question at hand and the context in which it was asked--a delay that could have been avoided entirely if counsel had been present for the questioning. These interruptions, which leave the grand jurors unoccupied and increasingly restless, inevitably cast the witness in an unfavorable light in the eyes of the grand jurors. Such interruptions can even be used against the witness in a subsequent proceeding, as in U.S. v. Kopel, 552 F.2d 1265 (7th Cir. 1977) (involving perjury charges).

But a larger problem is that a lay witness may not even know when to consult with the lawyer, not understanding the ramifications of a question, or of a line of questioning, sufficiently to appreciate that important rights of the witness may be at risk -- involving, for example, self-incrimination or privileged information.

As I alluded to earlier, Mr.Chairman, there are now seventeen states in the Nation which have enacted legislation allowing counsel in the grand jury room. And it is very compelling to note that none of the host of abuses or disruptive results feared by the Justice Department over the years has yet materialized, in more than a decade of practice, in any of those states. Indeed, this is a finding that was made by a study supported by the Justice Department itself ("Grand Jury Reform: A Review of Key Issues," Office of Development, Testing and Dissemination, National Institute of Justice, U.S. Department of Justice, NCJRS Catalogue no. NCJ 87645 (1983)). Based upon extensive interviews with judges, prosecutors and defense lawyers, the study concluded that the "the presence of counsel in the grand jury room has not resulted in the scheduling problems or disruption anticipated by some." Under the 1977 Massachusetts provisions, for example, the study reported "few if any attempts by attorneys for grand jury witnesses to exceed the limits of their role." One prosecutor observed that the "only impact" of the law was "the avoidance of continual entrances and exits by the witness [to consult with counsel outside the grand jury room]." In South Dakota, the study noted that "prosecutors and private attorneys alike indicated that no significant problems had arisen from exercise of the right to counsel."

In fact, the measures pending in both the House and Senate take extra pains to ensure that such problems will be avoided. They would permit the attorney only to advise the witness--the primary focus being self-incrimination issues--and not to address the grand jury or directly participate in the proceedings. The supervising court would be empowered to order the removal of disruptive counsel.

We strongly urge the members of this Subcommittee to work with their colleagues on the Judiciary Committee to pursue prompt action on legislation providing for the vital safeguard of counsel in the grand jury room.

## Jencks Act reform

The present requirement under the Jencks Act, section 3500 of title 18, U.S.C., that disclosure of witness statements such as grand jury testimony may take place only after the witness has testified on direct examination, is a profound and unnecessary encumbrance upon the swift and fair adminsitration of justice. It is guaranteed to result in what is often described as "trial by ambush." It is also guaranteed to waste time and judicial resources, by putting off until the midst of trial the disposition of motions which may make trial unnecessary, or at least premature. The importance of this "cost" consideration was recently stressed by the Supreme Court in the Mechanik case, when it cited the "substantial social costs" of retrial in support of its refusal to dismiss an indictment after conviction.

Legislation to revise the Jencks Act, by permitting discovery of witness's statements at any time after indictment, is currently under active consideration in the House (H.R. 4007), but no similar measure has been proposed in the Senate. NACDL recommends its inclusion in any legislative package dealing with the kind of prosecutorial and investigative abuses under consideration by this Subcommittee today.

## Conclusion

I hope that the issues I have raised and the suggestions I have made today on behalf of NACDL will prove helpful to the

Subcommittee in its difficult search for some constructive way to deal with these abuses. We think it is clear that under current law, the abuses will continue. But even more distressingly, many will go entirely undetected, unless the fundamental safeguard of allowing counsel in the grand jury room is adopted.

Thank you for the opportunity to appear and testify at today's hearing, and for your kind attention to our views.

This concludes my prepared statement. I would be pleased to respond to any questions the Subcommittee may have.

Mr. VAIRA. Senator, so you won't be confused, there is a substantial body of law upholding informal immunity in many, many circles, following this case, citing this case, and disagreeing with it. There is a substantial body of law upholding that.

Senator ARMSTRONG. Upholding it?

Mr. VAIRA. Upholding it.

Senator ARMSTRONG. Upholding the propriety of it?

Mr. VAIRA. Yes.

Senator ARMSTRONG. Mr. Russell's view is that it is not proper and not sanctioned by law, but I think he said that he recognized that it is accepted by many lawyers and many courts.

Mr. VAIRA. Except, it is not a situation where it is just done everybody agrees with it; it has been in front of at least three or four circuits and a number of district courts, citing Kilpatrick and disagreeing with it.

Senator ARMSTRONG. I understand, that as a matter of law Mr. Russell thinks is not sanctioned and that you think it is. My interest is a little different, as to whether or not it as a matter of policy it ought to be sanctioned and, if so, whether or not, as suggested by Mr. Grossman, who did not call for abolishing pocket immunity but called for statistical reporting so that Congress would know the extent of the practice and how often the Government made its case through the use of pocket immunity—I mean, I guess I would have to think as a citizen and a taxpayer and as a Senator that, if we had a persistent pattern—I mean just over and over and over again—of the Government making its case through what somebody characterized as "contracts with witnesses," in effect where they are saying, "We are not going to get you if you will help us get so-and-so," that would make me very apprehensive. I don't know whether I would go quite as far as Mr. Kilpatrick did, but the thought of going around making those kinds of deals on a widespread basis, and that really being the basis for a lot of the cases in court, would make me at least uneasy. At the very minimum I think I would want to know what was going on, which evidently we don't at the present time.

But I would be happy to have you comment on that at any length this afternoon. Thanks.

Thank you everybody. Let us reconvene, if it is convenient for everybody, at 2.

[Whereupon, at 12:21 p.m., the hearing was recessed, to reconvene at 2 p.m.]

## AFTERNOON SESSION

Senator ARMSTRONG. The committee will come to order.

May I ask that Mr. Kilpatrick and Mr. Grossman and Mr. Waller return, and we will see if we can go through quickly the items that they covered in their testimony this morning.

I am grateful to you for returning a little out of the timeframe that we originally had in mind, and I hope we won't have to hold you too long.

My impression, let me say, of your testimony this morning was that it was about as interesting and about as pointed as any testimony I have heard around here, and I am thankful to you for that.

I must say that in my years in the Senate I have heard an awful lot of testimony. It is mostly boring as dishwater; it is mostly expressions of generalities, and I am really glad, particularly because of the nature of the inquiry we are undertaking, to have testimony that is specific and is pointed. It has been very helpful, and we are very grateful to you.

So, with that word of introduction, I would like to just ask a couple of questions of Mr. Kilpatrick.

Just for the record, is $6 million the approximate amount that it cost you to defend this case?

Mr. KILPATRICK. Yes, sir.

Senator ARMSTRONG. Have you gotten any of that back?

Mr. KILPATRICK. No, sir.

Senator ARMSTRONG. Do you have any hope of getting any of it back?

Mr. KILPATRICK. Not really; there is no procedure for it, to my knowledge.

Senator ARMSTRONG. All right.

Could you take a moment to detail the personal treatment which you were given by those prosecuting the case? How you found out about the case, were you at any point put under arrest, were you jailed, or anything like that?

Mr. KILPATRICK. I was jailed. As I indicated this morning, I was put in for 22 hours, which was really sort of interesting.

The subpoena they issued me was very cleverly worded. They accused me of owning I guess four foreign corporations that I did not own. There is nothing wrong with me owning them, it is just that in one of my offering statements I said that I didn't. And if I really did own them, I would have committed perjury in the offering statement, and therefore they could put me in jail.

So what they did, they worded the subpoena in such a manner that said, pursuant to my authority as an officer, director, and owner, or beneficial owner:

> You are required to turn over these documents. And if you turn them over, that will prove that you are either an owner, officer, beneficial owner, or director. But you have said you weren't, and we are going to put you in jail. If you don't do what we have told you to do, we are going to put you in jail for not doing what we told you to do.

And it was clearly stated in there.

I said:

> I will be glad to. I know the people. I can get the documents. They are not secret; nobody cares if you have them. Change the wording of the subpoena, and I will turn them over.

They wouldn't change the wording. They put me in jail for 22 hours. The next day, after I got out—this is wonderful; it is a good example of Mr. Snyder—he told me, with his hand resting on my shoulder after I had been given bond—I think they were asking for $10 million, and I was given personal recognizance. As I started walking out of the courtroom he said:

> We knew you'd get out, Kilpatrick; you have all these fancy attorneys. We just thought we would put you in a little while and let you start getting used to it, because we intend to put you back in for a long time, and you can start getting used to it.

That is really sort of the attitude of the Government attorneys all the way through it.

Senator **Armstrong**. Were you physically restrained at any time?

Mr. **Kilpatrick**. Well, I was cuffed.

Senator **Armstrong**. You were handcuffed?

Mr. **Kilpatrick**. I was handcuffed and leg-ironed.

Senator **Armstrong**. And leg irons?

Mr. **Kilpatrick**. Yes, sir. What was interesting, I could understand that when I was going to jail. I could understand that when they were transferring people from the city to the county, that maybe they feared I would try to escape. But when I was returning from the jail they knew that I was going down to be released, they knew that I had the money with which to make the bond, all the way back down the Federal marshalls did not cuff me. I sat in the car and talked to them. I made it as far as from here to the microphone, outside the door, and up walks Snyder and said, "Have him put on the leg irons." I said, "Snyder, my family is in there—my children are in there. There is no abiding reason for them to see me in that configuration." He said, "You are not going at all until you get your feet together and your hands behind your back."

So, I had the honor of going in cuffed and in leg irons.

They released me, you know, after that point.

Senator **Armstrong**. Prior to the initiation of this grand jury investigation, had the IRS contacted you or your company to raise questions about the proposed nature of your business, the tax shelter offerings that you had made?

Mr. **Kilpatrick**. No. Up until that time, basically they had been using the Securities and Exchange Commission as a stalking horse. We had several inquiries from the SEC, all of which we survived and none of which found anything that we had done that was wrong. We finally signed a consent order to get them out of there so as not to disobey the law. You know, it is illegal to disobey the law, whether you have signed something that says you won't disobey the law or not. But if they agreed to leave, we would do that.

That was a thing that was interesting about that request for the grand jury. They said, therefore, it is impossible to make a case by civil procedures, leading up to the criminal grand jury.

What is really interesting about that is that the burden of proof is on the Government in criminal proceedings. They said, "Kilpatrick would not supply us with the documentation and the information."

The SEC had come to us and asked for our complete customer list. We had refused to give it to SEC, because they had no right to it, and they are in fact specifically forbidden to do so.

We had experience with another company, where the SEC asked for the list and promptly turned it over to the IRS, and then they wound up having to defend themselves and all of their customers in alphabetical order, instead of it being the random 1 out of 20 that they supposedly audit.

So, we said no, we would not do that for the SEC. They then said, "The fact that Kilpatrick refused to cooperate with the SEC is proof that he would not cooperate with a civil audit." As if I had a choice. I had sold tax shelters promising somebody a deduction.

The burden of proof is on us to prove that we did what it is that we did.

What would they suggest we say when they come out and ask for the proof? "No, they are entitled to a $50,000 deduction, but it is a secret as to why, and we are not going to give you any documents to show why"? I mean, the entire premise was absolutely absurd.

Senator ARMSTRONG. All right, thank you. Please standby.

Let me now turn to some of the observations of Mr. Grossman.

Mr. Grossman, you did not represent Mr. Kilpatrick, but Declan O'Donnell.

Mr. GROSSMAN. Yes. I represented the attorney Declan O'Donnell, who was the attorney for Mr. Kilpatrick and wrote the prospectus and offering memorandum involved in the shelter.

Senator ARMSTRONG. In his testimony Mr. Kilpatrick—that is in his testimony here today—makes the observation that this is a pattern; that is, the abusive conduct which he has referred to is a pattern. And in fact he quotes both Judge Kane and Judge Winner as describing it as a pattern, and in fact points out that the Department of Justice says, in effect, "We do this all over the country; we do it in all of the different circuits." I am not quoting, but I am paraphrasing what he has testified.

Is that consistent with your observations?

Mr. GROSSMAN. It is consistent with my observations with this and other cases, but with specificity to this case, I do not believe I ever ran across anyone with prosecutorial authority, whether it was Mr. Snyder or Mr. Blondin or Mr. Scharf or any of their reviewers, who I really genuinely felt believed that they had a concomitant obligation to be as fair as possible to the defendant along with their obligation to get a prosecution conviction if there was guilt.

I felt that the pattern, the attitude, was pervasive on all sides on Justice at all times, that they were out to get a conviction.

As proof of that, I don't believe we ever ran into any arguments from the U.S. attorney for the district of Colorado, Mr. Miller, or any of his subordinates, during the time I was involved in the case. Basically this case was tried out of Washington, DC, without any implication or any insinuation of the U.S. attorney's office in Colorado. I even further believe that the judges held that letters were sent by special agent; Rabun, in this case, with the authorization of Jake Snyder on U.S. attorney stationery, which was never authorized by the U.S. attorney for the district of Colorado.

Senator ARMSTRONG. I want to ask you, if you would, to now draw upon your experience as the defense attorney. I am not going to ask you a lot of questions about the matters you have already testified about, simply because your opinions and the facts you have presented are perfectly clear. But I do want to ask you to comment on what some other people have said, so that when we get all done we will be able to tell what everybody thinks about each of several issues that have been raised.

First of all, let me direct your attentions to the observations of Mr. Waller, who expressed concern that grand juries are in many cases a rubberstamp. Do you feel that is a fair observation?

Mr. GROSSMAN. I agree. I think that you have an enormous desire on the part of the U.S. attorney or prosecutor to use the grand jury and its subpoena power to get information and documents. I think that Mr. Waller's observation that any grand jury can be convinced to indict a ham sandwich is probably accurate. I think it is unfortunate, because the genesis of a grand jury is basically to act as a stumbling block to the prosecutor, it is there to ensure that there is probable cause.

But when you have an articulate, well-educated, well-dressed U.S. attorney or assistant in the grand jury room where there are 23 people without the insinuation of any defense attorney or the defendant himself, things can be said and papers can be generated to convince the grand jury to do anything.

Sometimes there is a runaway grand jury, but if that is one case in a thousand I would be surprised. Basically, the grand jury, in my opinion, has come to serve the function of a subpoena power and securing information and documents, both witness testimony and otherwise, for the benefit of the prosecutor and does not discharge its function as it is charged with determining whether there is probable cause and making a distinction between the prosecutor and the prosecuted.

It is easy for the grand jury to become convinced by a compelling argument by the prosecutor that they must find, and so on and so forth, that they must issue a subpoena, and so on and so forth. And basically, all the paperwork is done by the prosecutor in the grand jury; so that subpoenas that are issued are returnable to the prosecutor or the FBI, information that is desired by them to make their case is first brought to the attention of the grand jury by those people. Basically it is nothing more, in my opinion, than a rubber stamp. That is most unfortunate, because that is in juxtaposition to what the genesis of the grand jury is.

Senator **ARMSTRONG**. Mr. Waller states that U.S. attorneys routinely ignore the Department of Justice Manual with respect to pocket immunity. Does that square with your experience?

Mr. **GROSSMAN**. Absolutely.

Senator **ARMSTRONG**. Mr. Waller commented on the *Omni* case, that it appeared it could be a big case used to intimidate other persons. That is the same contention that Mr. Kilpatrick makes with respect to his case, that in fact the whole idea was to scare people out of the business in which he was in.

Mr. **GROSSMAN**. Omni happens to be, on the civil side, a client of my law firm. And I am familiar with the principals in *Omni*, although we did no criminal defense work at all.

It is a most unfortunate case. It represents, in my opinion, an equal evil perpetrated by the Department of Justice. And but for the millions of dollars that were spent on defense in *Omni*, testing paper marks so that we could make sure that there were defalcations and that there were Government interventions, in the normal course I don't think we would have found that out. I think that *Omni* represents as insidious a pattern, *Omni* represents as evil a motive, as does *Kilpatrick*.

Senator **ARMSTRONG**. In his prepared testimony, Mr. Waller states—and I quote—"If I believed that the *Kilpatrick* case was an isolated example, I would be upset that it happened, but I would not believe that hearings such as this would be justified; however, my experience has confirmed that this is not the case. There are numerous instances where the system has broken down." I take it from what you have said that you would be in agreement with that.

Mr. **Grossman**. I agree with Mr. Waller's analysis, because any time you have a justice system that does not afford the protections of the Constitution to targets and defendants, the system has broken down and the prosecution has failed, even if they get a conviction.

Senator **Armstrong**. Mr. Waller in his testimony bears down very heavily on the point that the use of the criminal prosecution system to enforce civil tax issues—that is, to gain enforcement of civil tax law—is just by its nature an abuse. Do you agree with that?

Mr. **Grossman**. I have to agree with that. I tried a case in Denver for all of the coal purchasers in the Kilpatrick transaction, and I heard—not to my amazement but certainly to my chagrin—representatives of district counsel's office from Denver tell Judge Cantrell, the special trial judge at the Tax Court, that, "irrespective of what Winner found, irrespective of what Judge Kane found, there ought not be a shifting of the burden of going forward," and that "all of the abuses should be ignored and the civil cases permitted to proceed in the regular course."

If that is allowed to occur, I believe you will give an incentive to the Internal Revenue Service to violate the criminal laws, with the hope of, first, intimidating and stopping anybody that wants to do what it is the Government feels is improper; and, second, you will have the ability to catch in the civil net the fruits of the improper criminal search. And I think that is wrong.

Senator **Armstrong**. One of the most alarming aspects of this to some of those that we have talked to, both in the testimony today and on other occasions, is this notion of the Government sending out communications to the customers of a firm saying, "We are investigating this company. We are thinking about indicting them," or we are doing this or that or the other thing, "what do you know about it?" Obviously, sending out letters like that is bound to be injurious to the business dealings of the company.

What can you tell us about that? Is this something that has happened only in the *Kilpatrick* case? Or do you know of other instances? And how could we provide guidelines or standards that would reasonably protect the rights of a company that is under investigation without completely hamstringing the investigators?

Mr. **Grossman**. I will be frank with you, Senator. My experience is that it is very hard to hamstring the investigation.

You have had, since I have been in law school, the Tax Reform Act of 1976 that has helped the Government, and the Tax Reform of 1978; you have had the 1980 act and the 1982 act and the 1984 act. They run with acronyms from TEFRA and DEFRA to TRA, and this year we are going to have another enormous change in the laws; at least, that is what we read in the Washington Post.

My experience is that when the Government comes to you and asks for weapons to use, investigative tools, the power of the administrative summons, the power of subpoena, the power to enforce, with wants, that Congress has been very generous in the treatment it has accorded the Government.

I guess what Mr. Kilpatrick and Mr. Waller and I are asking is for some balance for the protection of individual liberties.

When the Government puts words down on paper, they may be false, but they tend to take on an authenticity and a validity all their own. The fact that the Government writes the words on paper doesn't mean that they are so, but it means that you have a tremendous burden in overcoming the presumption of administrative regularity that attaches to those words.

I was with Government for 4 years, and I can tell you that 90 percent of the people that I ran across were good, decent, hardworking, honorable people. And I don't mean to impugn Government workers, attorneys for the Internal Revenue Service or the Department of Justice, because I think that basically they are good conscientious hardworking people out to do a job. But there is 10 percent left.

Senator ARMSTRONG. Your experience in the Government was, at least in part, as an attorney for the IRS in the Tax Court Litigation Division?

Mr. GROSSMAN. It was.

Senator ARMSTRONG. From that experience, are you familiar, or to what extent are you familiar, with the OPR procedures?

Mr. GROSSMAN. I am only familiar with those procedures as they relate on the other side to clients of mine or letters I have written to the Department of Justice. It has been my experience that that is somewhat of a "secretive" agency. It is hard for me to tell who OPR is, what their functions are, what their responsibilities are, because they seem to be clothed with an aura, an atmosphere, and an avowed duty of secrecy.

But when I hear that someone has been cleared by that kind of investigative staff, and I don't see any evidence that they have done any investigation, I can only come to the conclusion that either the investigation is so secretive that I would not know about it, or that it has not been performed properly at all.

Senator ARMSTRONG. In your recommendations for legislation you suggest the opportunity for defendants to recover attorneys fees and damages if they are overzealously or abusively prosecuted. In his recommendations, Mr. Waller makes the suggestion that we enact H.R. 1407 or something comparable for the purpose, among other things, of allowing witnesses before the grand jury to be accompanied by and to confer with attorneys. Any comment on that?

Mr. GROSSMAN. I think it would be a tremendous help for the administration of justice if all of those things were enacted. I don't think that one is mutually exclusive of the other.

Senator ARMSTRONG. Well, clearly, he is aiming at curtailing the abuse before it happens, and your recommendations aim more at discouraging the abuses by providing a real penalty at the other end.

Mr. GROSSMAN. I think if you enacted both those kinds of legislation, you would discourage prosecutorial abuse from occurring in the first place and provide a remedy for those who were injured in the second place. I think they are both consistent.

Senator ARMSTRONG. Yes. In my opinion you are right. I am going to try to leave that open until after we have heard from Justice. But I must say that the logic of it seems pretty strong.

Could I ask, Mr. Grossman, how you feel about taking the criminal investigation function out of IRS and lodging it somewhere else? That is another of Mr. Waller's recommendations.

Mr. GROSSMAN. I would endorse that.

Senator ARMSTRONG. This is fun, getting you guys to give recommendations and then commenting on each other's proposals. And the only reason I am doing that is not to put any of you on the spot, but simply so that we have got a record of a range of people. And I am going to ask our one remaining witness, when you are done, some of the same questions.

Mr. GROSSMAN. I would endorse Mr. Waller's proposed legislation. I don't think that it is reasonable to assume that without tremendous action that will occur.

Government functions are very jealous and guarded of the duties that they have. For example, in the U.S. Tax Court all you find are attorneys from the Internal Revenue Service, Office of Chief Counsel and District Counsel. In all the other courts—that is, the district court, the claims court, and I suppose the other various courts that you have got—you are going to find Department of Justice personnel; for example, in the circuit courts. It is very difficult for Government to want to give up a part of its given responsibility, because it means less budget, less prestige, and less authority. So, to do that, I think, would take a tremendous amount of legislative input, to divide the responsibility for the criminal cases against those of the civil cases.

Nonetheless, it would be a great idea, because you would be then able to discharge a responsibility, for whatever purpose, exclusively for the agency for whom you worked, without regard to how it would help some other agency enforce its position.

Senator ARMSTRONG. Mr. Grossman, I appreciate that. I now am going to ask Mr. Waller a few questions.

You have recommended a number of legislative reforms. For the same reason that I didn't ask extensive questions of Mr. Grossman about his suggestions, I am not going to ask you, either; although I will just indicate to you generally that I am sympathetic to them, and depending on what we will discover it may well be that I will try to get some of my colleagues interested in those issues.

I would like to go over a couple of things from the earlier testimony.

Mr. Kilpatrick points out that in the testimony before Judge Kane or Judge Winner—and I am not sure which—that the IRS and Justice Department admits having made a regular practice of swearing agents of the grand jury procedure, which I guess is undisputably improper. I have heard no dispute about that.

In your experience—not necessarily in this case but generally from your practice—does that square with what you know about it?

Mr. WALLER. There are two points to answer to your question, Senator.

The Department of Justice takes the position that the practice is proper, or acceptable. It is not specifically provided for anywhere in any of the rules of criminal procedure or in any of the statutory law. There is no specific way of making a person an agent of a grand jury, but my experience and the testimony of the IRS and the Justice Department in the *Kilpatrick* case indicate that it is widely done.

Now, there have been some other courts that have had the same issue come up, and some of them since the *Kilpatrick* case first came down. Once again, we are probably in a position where we need some legislative guidance, because right now the Justice Department has been successful in convincing some courts that the process, although not specifically provided for, isn't that bad and maybe should be allowed from time to time.

Other judges, for example Judge Kane, had a very articulate opinion where he indicated, as Judge Winner testified yesterday, that it is just a contradiction term and shouldn't be allowed under any circumstances.

So, it is an issue that needs to be looked at.

Senator ARMSTRONG. It is really an area that Congress, perhaps, should try to resolve.

Mr. WALLER. I think so, because the problem you have is, the Government agents who testify before grand juries have an awful lot of influence, anyway, because they are introduced as an FBI agent or an IRS agent, and they are very well prepared, usually—they know how to testify; they testify often in court or before grand juries.

Well, in this case the U.S. attorney who was conducting the grand jury actually performed an oath on the two IRS agents in front of the grand jury, in which he indicated to the agent that "you are now working for the grand jury," and to testify truthfully and find things for them, and whatever. It gives them this cloak of respectability. They are in and out of the grand jury oftentimes after that. It gives the agents the feeling that they have some sort of special powers that they don't have. In fact, in our case and in some other cases I have seen, the IRS agents oftentimes run the grand jury investigation while the U.S. attorney is attending to other matters, and so on.

Here a grand jury is supposed to be evaluating the testimony of all the witnesses; but a bunch of the witnesses against the defendant are these people who have been put into this special category of grand jury agent.

It is a difficult process and one I don't think should be allowed.

Now, the rules do provide that if the grand jury feels that it needs some investigative assistance, there are funds available to enable the grand jury to in fact hire its own agents that would, then, carry on investigations or inspections, or whatever, that they need to do. It doesn't happen very often, and, really, these agents of the grand jury aren't performing functions on behalf of the grand jury; they are conducting their own investigation with this new mantle of power as agents of the grand jury.

It is sort of a myth, theoretically, that in some cases it isn't even a grand jury investigation at all. In reality, it is still an IRS investigation; IRS is running it. The only thing they are using now is grand jury subpoenas that they type up in their own office and that are often returnable to them instead of the grand jury.

I believe there was some testimony, either by Mr. Russell or Mr. Grossman or someone, or maybe it was Judge Winner yesterday, who pointed out that it is not unusual for a grand jury to be impaneled somewhere, it hasn't been sitting actually for say a week or so, and the U.S. attorney or the IRS agent decides that they want to interview somebody. They will actually type up a subpoena to appear before the grand jury, take it out to a witness anywhere, and say, you can either talk to me and give me a complete statement, or I will give you this subpoena and have you come back before the grand jury.

That creates some real problems in my mind, since Congress has specifically indicated what powers, subpoena powers, the IRS has normally, and what type of subpoena powers Justice has in getting subpoenas from the court.

It was not intended, I believe, by Congress or the Founding Fathers that the grand jury subpoena process would be used in this fashion.

Senator ARMSTRONG. I regret to advise you that a vote is occurring on the floor of the Senate, and with your indulgence we will just recess for about 10 minutes. I will wander over and vote on that, and I will be right back.

Thanks. I am sorry to have to do so.

[Whereupon, at 2:35 p.m., the hearing was recessed.]

## AFTER RECESS

Senator ARMSTRONG. Friends, I apologize for being interrupted. It turned out there was not one but two votes. So, having taken care of that, let me just pick up where we left off.

I think we were talking to Mr. Waller. I have forgotten exactly where we were, but I believe I was about to ask about the suggestion made by Mr. Kilpatrick, that what we really ought to have is a special prosecutor to reduce ratings, dismiss or suspend from government service, request appropriate action for bar associations, and in the case of flagrant criminal acts undertake criminal prosecutions.

His notion, and I am now paraphrasing, seems to be that if we don't, that they will "circle the wagons" and that really this kind of abuse will not be deterred or punished. What is your view of that?

Mr. WALLER. I think, as I indicated in my written statement, that it is a sad thing to a certain extent; but it has been my experience that groups are just not good at investigating other members of the group—whether it is doctors investigating doctors, lawyers investigating lawyers sometimes. And it appears to me, at least from my experience in this case and never having been involved in a case that was quite this blatant, that the conduct of the Office of Professional Responsibility, as far as I am concerned, would indicate that it is really more in the category of the whitewash rather than a real bona fide investigation.

I am afraid that when the Congress is looking at that, there always has to be real serious consideration given to the possibility that someone who is in charge of making sure that people are doing what they are supposed to do within the Department of Justice may very well have to be somebody outside the Department of Justice who has that responsibility.

I think that could easily be done in the case of a special prosecutor, or there may be an office, a watchdog office, that is established for government lawyers generally, that is independent of the various departments. And I think those types of penalties are by no means unreasonable; I think it could go from anywhere from a letter of reprimand to a suspension, or even recommending that the individual be fired.

Now, the local bar associations, when they are doing their own business, they have to handle their own affairs, and I think generally they are pretty good at that. But if you had some sort of special office that made certain findings and certain recommendations, they could obviously refer those to individual courts or bar associations for further action after they have taken their action.

But I think the Federal Government does have to have an effective way of policing or being a watchdog on the actions of its own people, or otherwise the bureaucracy is really out of control.

Senator **Armstrong**. Then there really is a doubt in your mind of whether OPR is able to do that?

Mr. **Waller**. I have a real question, based upon their performance in this case. It would really bother me that they are effectively doing that. And the *Omni* case. Judge Black in that case pointed out some real serious violations, that I think if a defense attorney had done them they would have been criminal. And Judge Black made that comment, that if some of the things that the prosecutors and the IRS did in that case had been done by a defense counsel after motions had been filed or subpoenas served, there undoubtedly would have been criminal investigation.

As a result, I think that the criminal defense bar is fairly well policed, because we have an adversary that has an effective way of getting back at us if we do something improper.

But it bothers me, in that case, that apparently there hadn't been any action taken recently, and on a similar incident 5 years before there wasn't any action taken, either. I don't think any of us really know how that OPR works, because it is a secret process. But I think it is something that should be looked into to find out what type of way they have it and what type of situation the IRS has, to do the same thing with their people, because their people were also involved in this case and the *Omni* case. As far as I am aware, there has been no action taken against the IRS agents in either one of those cases, either. So, I don't know what type of internal mechanism they had, either.

Senator **Armstrong**. Mr. Waller, I want to come back to you in just a moment, but I want to return for a moment to Mr. Kilpatrick, to just establish one fact, and then ask a legal opinion of Mr. Waller and Mr. Grossman.

Mr. Kilpatrick, you mentioned that others have been convicted of the offenses of which you were indicted, which later were dismissed as not constituting a crime. You said that this morning, and you said it to me on one or more previous occasions in private conversations, that other persons in other cases under the same fact situations had either plea bargained or pled guilty or did something, but in any case were convicted, and in some cases they actually had served time or were serving time for those offenses.

Could you tell us who some of those people are? Are these actual persons known to you, or is that just a speculation?

Mr. **Kilpatrick**. John Pettingill was in my case. He was one of the seven parties indicted to me. He ran out of money. His attorney, Mr. Plato, was like $25,000 a week. John Pettingill came into this thing with a free and clear home in Grand Junction, CO. He mortgaged and mortgaged and mortgaged until his apple orchard would not even pay the interest on this, and he finally ran out in October 1982, went in and plea bargained and got 1 to 5 years for a crime that was never committed.

Senator **Armstrong**. And did he in fact serve this sentence?

Mr. **Kilpatrick**. He is still on probation. He never actually went in prison in that particular one.

Mr. Joe Laird, who introduced me to this business in 1977, from California, has been convicted in the State of California of this crime. He is waiting on appeal.

Interestingly enough, that appeal has been waiting to go to appeal for about 3 years, because the Government has lost the transcripts of the hearing, and he can't file. Isn't it amazing how they can lose those things whenever it is not beneficial?

Mr. Malos and Mr. Jones of South Carolina were convicted of 5 years. I understand they served 4 months before they appealed in the fourth circuit, using the *United States* v. *Kilpatrick* as the basis of their appeal, and they are now out. Mr. Malos—I haven't heard from Mr. Jones for a while—called to worshipfully thank me for having the amount of money. The first statement he made to me was, "I didn't have $6 million. I am broke."

Senator **Armstrong**. What happened in that case? They appealed, and on the basis of the court's finding in your case their appeal was sustained?

Mr. **Kilpatrick**. Yes, sir. That was my understanding, what Malos told me. They came in and on the appeal the U.S. attorney came in, and the circuit court judges there asked her a question. They said, "Are you telling us you haven't heard of the *United States* v. *Kilpatrick?*" And they said, "Well, no, not really."

Senator **Armstrong**. Who asked that question? The judge or judges?

Mr. **Kilpatrick**. The judges asked the U.S. attorney, "Do you mean you haven't heard of the *United States* v. *Kilpatrick?*" She said, "No."

Nobody in the United States has failed to hear about the *United States* v. *Kilpatrick*. You are telling me you work for the——

She admitted she had, and they reversed the conviction at that point.

Senator **Armstrong**. Reversed the conviction?

Mr. **Kilpatrick**. Yes, sir; and Mr. Malos is out now. I don't know, but it is my understanding he served 4 months of a 5-year sentence.

Senator **Armstrong**. Well, then, for Mr. Waller and Mr. Grossman, what is the outlook for somebody who is in the situation of the four people that Mr. Kilpatrick has mentioned, two of whom I guess are still under some threat, their case is under appeal, or one of them I guess is on probation. What is the outlook for them in light of the decision in the *Kilpatrick* case?

Mr. **Waller**. If I might intervene here, I think obviously each case is a different type of case, and there is no doubt in my mind that there have been people who have just had to give up and maybe enter into a plea agreement that either allowed them to get probation or some sort of reduced potential sentence because they didn't have the money to fight. And I think that happens probably in our justice system more often than we would like to admit.

But you are dealing with a very complex area of the law. I think I mentioned in my statement that you can have very highly trained tax specialists sit down with one another and disagree as to exactly what Congress meant when it passed various provisions of the law.

The problem that you have when this winds up in the criminal side of the shop is that, in this case and in the *Malos* case you have a situation where the courts ultimately found that the interpretations that were put on them by the defendants were not in fact criminal, they were good-faith beliefs that the tax law allowed them to do what they did.

In our case, we had the district court make that decision. In the *Malos* case, unfortunately for him it wasn't, until the appellate court made that decision.

In the case of prosecutorial misconduct and the abuses that were discovered in this case, right now, the way the law stands now and the way the law I think properly is, about the only thing that can happen is that a district court exercising its supervisory power can dismiss an indictment or say, "Government, you are not going to profit from your ill-gotten gains."

Senator **Armstrong**. Do you mean if a district court merely happened to become aware of the fact, they retain enough jurisdiction that they could do that if they wished to?

Mr. **Waller**. Well, in certain extreme circumstances like this case and the *Omni* case. Those were both cases where Judge Kane and Judge Black were exercising their general supervisory authority over the grand jury and making sure that that process is carried out; if they become aware of it and it reaches an extreme point, then the district court has some limited powers to dismiss the indictment.

The concern that we have now with the *United States* v. *Mechanik* case that has been talked about and the Jencks Act that has been talked about, is that sometimes when these problems exist, defense counsel, regardless of how attentive he is to the details and how attentive he is in trying to discover this information—and as Judge Black said, if he had taken at face value what the Government said, which is his predisposition, in that case he would never have found out what happened.

Well, a lot of times you can't find these things out until after a trial has already started. In our case, it was halfway through the trial when a lot of this information first came out, and we actually got the grand jury transcripts during the hearings on our motion for a new trial.

That motion for a new trial was granted, so we are back into a pretrial phase, if you will.

Senator **Armstrong**. I think I understand that part. I understand the problem represented by the decision in the *Mechanik* case. And I do understand the other issues you raised. But I was getting at a slightly different point, and I want to be sure I understand it correctly.

Mr. Kilpatrick's contention, the first time he called me on the telephone, was that he was about to be indicted for something which in his opinion, and in the opinion of his law firm, did not constitute an offense—it wasn't a crime.

Mr. WALLER. Correct.

Senator ARMSTRONG. And the point is, as I understand it, that there are others who have already been tried and sentenced on these same charges; that, if in fact these aren't a crime and we have some poor devil who has already been convicted, maybe he has already served some time or maybe he is still serving some time, if there are such cases, or he has his case under appeal and his life is under a cloud, or even somebody who has served their time and is out, it does seem almost elementary justice that there ought to be some remedy to at least get their record cleared. But I am not clear about that, and I am not saying those are the facts. But that is what Mr. Kilpatrick says, is that the facts were identical.

Mr. WALLER. It is impossible to get a completely clear record once you have been indicted and once you have been tried, or whatever. The facts remain there. Ultimately you will have on the record that the indictment was dismissed, or you will have the reversal of the conviction, as we do in this case and the *Malos* case.

But these cases are so complex that I think it is impossible to make a statement that it is easy to tell which cases are similar to our cases and which ones aren't.

Senator ARMSTRONG. Well, except in the case for the man in Grand Junction, that would seem to be an identical situation, because he was indicted as a part of the same case, was he not?

Mr. WALLER. That is correct. And what I understand the situation is in that particular case—he has already entered a plea of guilty to a reduced offense and has been placed on probation, which was part of the agreement—subsequent to that, Judge Kane dismissed the indictment for failure to state a claim.

It is my understanding there has been some sort of additional negotiations between his counsel and the Government to the effect that, if Judge Kane's ultimate findings are sustained on appeal or the case is dropped by the Government, that he may very well be allowed to go in and withdraw his plea, and the Justice Department would not object to that, so that his record would in effect be clean.

But that is gratuitous; it was not part of the original deal. And he happens to be part of our very case. Someone else in a similar situation who had to give up may or may not have that option open to him.

Senator ARMSTRONG. Ann Vance, would you be sure that we get that in our notes for Monday? It would seem to me that that would be something we could ask the Justice Department about. I would think it would be in the interest of justice, both the interest of the concept of justice and in the interest of the Department of Justice, for them to review recent convictions to see what group of cases may be similar, and for them to explore ways to make amends.

Honest to Pete, I would think that would be the least they could do.

Mr. **Grossman**. Senator, let me just give you an idea of the problems you may run into.

In the hypothetical case, you may have an individual who has not filed tax returns for some period of time—only hypothetically, assuming this may be a case. He may be also named as a target or a defendant in an existing prosecution. He may decide to plead guilty to the offense in the existing prosecution in order to avoid or plea bargain away another offense or offenses which he may have committed.

So then you have a situation where——

Senator **Armstrong**. You wouldn't want to let him off on that if he was just doing it to get out of something even worse.

Mr. **Grossman**. Right. And then you have got the further insidious inference that, "How could it possibly be that Kilpatrick has not committed an offense, when I have already got somebody, Your Honor, who is going to jail, who has admitted that he has committed that offense and that it is sentenceable and commitable?" So it is a double whammy.

The criminal justice system, so far as I see it, is full of bargains and pleas. It doesn't necessarily mean that one is guilty of the offense to which he pleads, if the bargain includes unstated offenses. So, you have the inference that Kilpatrick must be guilty of the crime because somebody has already pleaded to it, and the problem that you envision, with having pleaded to a crime that doesn't exist in order to exculpate oneself from imposition in something that might have been a crime for some other period of time.

Senator **Armstrong**. Well, Mr. Grossman, you and Mr. Waller are experienced defense attorneys, and Mr. Kilpatrick is an experienced defendant. [Laughter.]

And I have never been in on any of this. But just as an everyday citizen, a businessman taking a few years out to come here and be a Senator, this is all shocking to me—I mean, the notion that there are people, and any large numbers of people, who are pleading guilty to some kind of a thing that isn't really, it turns out, a crime in order to avoid being prosecuted for something else that they really did do that is a crime, and all these deals being made out at the water cooler to get testimony from people who would otherwise themselves be prosecuted.

I mean, I am not naive about it, but, honestly, it really is not reassuring to those of us who sort of have an idealized concept of the system of criminal justice.

I think before we leave this point, however, I want to come back to—I believe it was your contention, Mr. Waller, that we ought to split the tax enforcement function from the criminal prosecution. I think that is a very good point, and as a businessman myself I frequently have reason to consult law firms about tax issues. And a lot of times they tell me, "We are not sure."

I can well understand how a fine point of law might be in dispute, even among experts, without rising to the level of a criminal offense, in any case. And I guess that is the point in the *Kilpatrick* case.

Mr. Grossman, I think I cut you off from the point you wanted to make.

Mr. **Grossman**. It wasn't much of a point. I was going to say that my little boy and I had lunch with Mr. Kilpatrick, and I said, "You see, it is much better to be a criminal defense attorney than a criminal defendant." [Laughter.]

Senator **Armstrong**. Well, gentlemen, I think that about exhausts what I wanted to cover. If anyone has a final point they would like to make, I would be glad to hear it before we move to Mr. Vaira, who has been patiently waiting and is now about 4 or 5 hours behind schedule.

Is there anything we ought to cover that we have not?

Mr. **Kilpatrick**. I would like to insert just a couple of clarification points. In the instance of Mr. Laird that I mentioned, who has been convicted and is waiting for appeal, for somebody to find the records so he can, make no mistake about it, we did exactly the same thing. I worked for him, and the first program we put together, we went out to California and sat down with him and copied word for word exactly what he was doing. It is impossible for one of us to be innocent and the other one guilty.

Two, by his own admission, Mr. Malos copied me. He whited out my name and put in his and xeroxed the thing off.

One of the things, in the "circling of the wagons," I really feel we should discuss this.

Early on in this, before I went to trial, when they seemingly couldn't find anything to charge me with, I guess they decided, "He hasn't committed a crime; let's create one for him to do." A man named John Danny Luft came to me and said, "Hey, boy, I'm real good friends with the prosecutors, and for $250,000 I can get this thing fixed for you. The prosecutor wants to quit and go into business for himself." I listened to him and finally agreed to pay $50,000 of it now and $200,000 of it later. And with a fury that I have never known in all of my life, I walked straight out of there to the FBI and reported it.

The FBI didn't want to take the report. Sometime later he got in touch with me again, tried again to get $250,000, and in this particular instance he had me meet him in the Brown Palace. Bill sat there with his yellow dog at the next table. We taped him on telephones so we could carry it to the FBI. We gave it all over, and they turned it over to the Office of Professional—the OPR.

It came up several times during the course of the future hearings, you know, "What ever happened to this report?" Nobody every knows whatever happened to it.

One of two things happened, Senator. Mr. Snyder was trying to entrap me, trying to create a crime for me to commit; or, Mr. John Danny Loft was committing extortion. But neither one of them was ever prosecuted.

Senator **Armstrong**. I have lost track of who John Danny Loft is.

Mr. **Kilpatrick**. John Danny Loft was the lad who came to me and said, "I can get it all fixed for you" on the instructions of the prosecutor. The prosecutor said, "If you will give him $250,000, he will fix it."

Senator **Armstrong**. Is John Danny Loft an employee of the Government?

Mr. **Kilpatrick**. Well, another attorney that we were dealing with later on came to find out he is a professional, seemingly, informant for the Government.

Senator **Armstrong**. I see. But he represented himself as being authorized in some way in this transaction by Mr. Snyder?

Mr. **Kilpatrick**. Yes, sir; excuse me, "an unnamed prosecutor." He just kept saying "the head prosecutor," or "the lead prosecutor," therefore I have always presumed it to be Snyder.

Senator **Armstrong**. And you reported this to the FBI?

Mr. **Kilpatrick**. Yes, sir; on both occasions.

Senator **Armstrong**. And nothing ever came of that?

Mr. **Kilpatrick**. It is just another instance of the "circling of the wagons."

Senator **Armstrong**. Ann, would you be sure that we get an inquiry off on this?

I feel as if I am being dragged into a quagmire. I am trying to find a way out. But I will follow that lead, for sure.

Mr. **Kilpatrick**. I think the FBI turned it back to the OPR, but that is just another one of the things that should be investigated.

Senator **Armstrong**. Except that, if Mr. Loft was not an employee of the Justice Department, why would they turn it back to the OPR? Isn't OPR an internal Justice Department review agency?

Mr. **Waller**. I think that there was a question here or the theory at least was a question of whether in fact Mr. Loft had been sent out by a prosecutor who was attempting to extort money from Mr. Kilpatrick. In any event, we never received a report back or any followup interview.

Senator **Armstrong**. I guess this is my last question of Mr. Grossman and Mr. Waller. Do you have any qualms about coming here to testify here today?

Mr. **Grossman**. Yes; I have got my wife and my family here today with me, and I have a tremendous amount of respect for the agency, the Internal Revenue Service, and for the Department of Justice.

I work as a tax attorney opposing those groups of people every day. But I felt, in spite of the fact that there is some inference and there is underpinnings and there is some rumor of "you shouldn't go to testify before a Senate Committee"—indeed, I understand the attorneys for *Omni* refused to do so, for whatever reason—I think it is important that you stand up and be counted.

I don't know what happens in terms of audits, I am audited every single year, and what happens, why people get audited. They don't make me privy to that kind of information.

But I was a bit reluctant to come before the Senate and to make these accusations, although I think they are well founded and well documented. But I think that some Americans have got to stand up and say, "Enough." And when you have met a Jake Snyder and you have gone through an entire process, and been through that process with him, the intimidation and the arrogance and all the things that have been so unpleasant, you say, "Maybe someday I will get a chance to come before some Senator and say what I feel." And I did, and I am glad that I did.

Senator **Armstrong**. Well, I am glad you did, too, and I appreciate your doing so. And I think it goes without saying, but let me just say it anyway, if you ever have any reason to think that, as a result of your appearance here today or your activities in connection with this hearing, that you are not being treated as you would have been otherwise, let me know. I don't know that I can be of help, but I would like to know it.

Mr. **Grossman**. I hope you are still in office then.

Senator **Armstrong**. Well, I am wondering if my tax attorney is going to be audited.

Mr. Waller, do you have anything in closing? Do you have any problems about this?

Mr. **Waller**. Well, I guess two things. Maybe I am a little bit too idealistic, graduating from the Air Force Academy and having been an investigator myself. I guess I really don't have any qualms about being here as far as being worried about reprisals.

But I still think the system—this is just part of the way the system is supposed to work, and this is the legislative branch who is responsible for passing the laws that the executive branch carries out. So, I am not really worried about being the target of reprisals.

The one concern I did have about being here is, sometimes when you get involved in this side of the law—we work in courtrooms, and we work with a lot of complicated mumbo-jumbo that doesn't make any sense to anybody sometimes. And we don't really understand how the legislative process works, as well as we should, perhaps.

I just hope that by making these statements and by making these comments, and trying to give you and the rest of the subcommittee some specific proposals—and I will indicate to you that we are prepared to assist you in the future with any drafting or anything along those lines—I just hope something that may be good will come of it, maybe just the process of airing some of these abuses will help prevent it from happening again.

But at the same time, I do think there is some solid legislation that might create a system, because you are always going to have some people who are going to go to the limit, and it is absolutely important that you have those rules in place so the bureaucracy can be controlled.

Senator **Armstrong**. I thank you. I thank you for coming, and I thank you for your statements. I thank you, Mr. Kilpetrick and Mr. Grossman and Mr. Mark. I hope we haven't given you too tough a workout. [Laughter.]

I appreciate your coming, nonetheless.

Thank you, gentlemen.

Mr. Vaira, if you would come forward. And am I now pronouncing your name correctly?

Mr. **Vaira**. Yes, Senator. Thank you.

Senator **Armstrong**. I am so sorry to keep you waiting; but, as fate has worked it out, here we are with the last two now. What I am hoping is that, after you have made any general statement that you would like to make, that you just help me think through where we go from now.

The people who have just been testifying have been involved in a case, and you have not. You are here to represent a professional organization.

Mr. **Vaira**. The American Bar Association.

Senator **Armstrong**. The American Bar Association.

I am advised by my staff that you are an expert on grand jury practice, and as I get it you are just here to help us think about this and determine what, if anything, needs to be done. So I am going to ask you to proceed.

Mr. **Vaira**. Yes, sir.

## STATEMENT OF PETER F. VAIRA, PARTNER, LORD, BISSELL & BROOK, CHICAGO, IL; AND VICE CHAIRMAN, GRAND JURY COMMITTEE, AMERICAN BAR ASSOCIATION

Mr. **Vaira**. I will not read my statement; I will just give you some comments I have.

In the matter of experience, I was a Federal prosecutor for 15 years. I was the attorney in charge of both the Philadelphia and the Chicago Strike Forces on Organized Crime. From 1978 to 1983 I was the U.S. attorney for the eastern district of Pennsylvania, which is Philadelphia.

I have been in an awful lot of grand juries, maybe more than any of the prior witnesses or the ones from the Department of Justice who will follow me. I write and lecture on this all the time.

I am presently a partner in Lord, Bissell & Brook, a large Chicago law firm. Eighty-five percent of my practice is taken up in this particular area; I deal with this all of the time.

Let me give you my experience. My thoughts are that there are some noteworthy suggestions made today and there are some good chances to make changes in the grand jury process. Some I think are solid and other ones are whimsical and don't have any chance of making it. I think that three solid ones can come out of this.

First, let me say that in my experience the events described here depict a drastic situation. It seems to me that the agents and the prosecutors here simply lost the horizon in this particular case and were going unchecked. I have not seen a situation like this in the 15 years while I was a prosecutor.

Let me say what I think as a practical matter that can come out of this, give you the bottom line without commenting upon the nuances that occurred in this case.

Senator **Armstrong**. Please do.

Mr. **Vaira**. No. 1, the ABA, the American Bar Association, has long been a proponent of counsel in the grand jury. That is a very prophalactic and positive step. All legal organizations that have studied it and all committees of the Senate and the House who have looked at it all agree that it is a good thing. I agree with it, too, and if I were back in the Government, if I were the Attorney General of the United States, I wouldn't have any problem with it, either.

There are 17 States that now allow a witness to have an attorney in the grand jury. It doesn't disrupt anything. He is permitted only to advise his client and not to make motions or disrupt it.

I don't think anything bad could come of it, and I don't think anyone from law enforcement or the Department of Justice can give any good reason why it can't occur. And I think, based upon the situation you have here, now is the time to put it through.

If you get that through and nothing else, you will have spent the time well.

The second proposal is not the ABA's, it's mine. It is that the entire grand jury transcript of a case, once a grand jury has returned an indictment, the transcript involving the prosecutors' opening statements, his colloquies with the grand jury, his advice on the law, and the transcript of any witnesses pertaining to that particular indictment ought to be turned over to the defendant.

Now, if the prosecutor has a reason that it shouldn't be turned over, the burden would be on the prosecutor to show particularized need why the transcripts shouldn't be turned over—for secrecy, or for some other reason.

The Seventh Circuit Court of Appeals has a sort of a modified procedure under a case called *United States* v. *Edelson*, in which if you raise it in some fashion the judge looks at the transcript. If the judge finds some sort of abuse, he gives the prosecutor the choice of either turning it over to the defense counsel or dismissing the indictment. I think if it is all turned over, I think a lot of these problems will go away.

Now, once again, I am looking at a prophalactic method.

I agree with one of the prior witnesses—I don't know who suggested this—that the Jencks Act material, the testimony of prior witnesses, be turned over at the time of the indictment's return. There is no use waiting until 2 days before, 1 day before, or at the time of trial. There is no need for that, and I don't think that will cause that much disruption.

Some judges right now, some very liberal judges, will say, "Turn them over a month ahead unless the prosecutor can give me some reason why he shouldn't." I don't think that is going to be a big problem.

So, those three positive steps: Counsel in the grand jury, the turning over of the grand jury material, and the amending of the Jencks Act, would be very positive steps and would go a long way to alleviate problems like this.

What I don't think are successful and not good ideas are, No. 1, giving the criminal investigation to the FBI. I strongly disagree with that.

No. 1, if the IRS has it and the IRS is investigating the criminal aspect, you still get to negotiate with the IRS, you still get conferences, you still get a chance to go to the Department of Justice and try to cut it off in Washington. And there is always the fallback that it will become only a civil case. And the majority of the cases in which an IRS agent, a special agent, is brought in eventually end up as civil cases. The majority of those go back and become civil. If you turn that over to the FBI—the FBI doesn't have as a purpose to collect taxes, the FBI's job is to get convictions—and automatically you turn it over to an investigative agency whose only job is to do that. One, they don't have the expertise, and I think they would be the first to admit it. They don't have the manpower. You don't get to negotiate with them, and you don't get to negotiate with Washington if that is the case; you are completely taken out of that particular safeguard that you have.

Senator **Armstrong**. Could I ask you to elaborate on that a little, in the light of some of the earlier observations? You make the point that a high preponderance of the cases that start out as criminal investigations end up being civil tax enforcement issues.

Mr. **Vaira**. That is right.

Senator **Armstrong**. That is precisely the nature of the abuse that Mr. Kilpatrick and his attorneys point out, that they will take a technical area of the tax law, an area perhaps that is even subject to dispute among experts, and they will prosecute it as a criminal matter, thereby escalating the stakes so much that they intimidate everybody, that they scare people out of that business who may be in it legitimately, and that it is the very fact that that happens that constitutes an abuse. Are their fears exaggerated, in your experience?

Mr. **Vaira**. I think so. I think if you heard from the general criminal tax bar, they would be vociferous in not wanting that turned over to the FBI.

Senator **Armstrong**. Or to anybody?

Mr. **Vaira**. Anybody else. That is right.

Senator **Armstrong**. In other words, it is not that they wouldn't want it to be with the FBI, but they just think it belongs to the IRS?

Mr. **Vaira**. Because you can continue to bargain with the IRS. You can continue to bargain. And since it is under the supervision of the Tax Division, you can continue to bargain with the Tax Division.

I have attended some seminars in which there was a threat of removing those conferences, and the Tax Bar criminal attorneys were up in arms about that.

I do not think we should give any more investigative jurisdiction to the FBI. I do not like the idea of a national police force.

Senator **Armstrong**. All right.

Mr. **Vaira**. And realistically, look at it this way: If the FBI has it, they are going to have to rely on some experts. Who would the experts be but the IRS agents who worked the case up in the first place?

Senator **Armstrong**. Of course, that is one of the things in the *Kilpatrick* case. What comes to light is that, apparently, the lead prosecutor did not consider himself to be knowledgeable of tax law. And in fact, according to what we have been told, he made some point of saying he didn't know much about it and he didn't think that was a big problem.

Mr. **Vaira**. To tell you the truth, I am not surprised at that. Knowing the Department of Justice, sometimes they get strapped for expertise and for hiring, and I am not surprised that somebody in the Criminal Tax Division doesn't have an in-depth knowledge of the tax. It shouldn't be that way, but that occasionally happens.

But what I am saying is that, even if you turn it over for the FBI to do the investigation, they are going to need somebody to tell them what happened, to go through the books. And who would their experts be? The experts would always be the IRS agents who put it together. So, you are back to a very practical situation.

I think the answer to that is, "Don't invite another camel into the tent."

Senator ARMSTRONG. All right.

Mr. VACHA. Second, the part about the private right to get attorneys fees. I like that idea, I just have some problems with where it is going to come in.

No. 1, let us assume that the judge has the power to assess the fees if he dismisses a case. The judge dismisses a case for prosecutorial misconduct, but he only dismisses it without prejudice. The Government is free to go back and indict again if they want to, starting all over again with a new grand jury. I don't know if many judges are going to be that quick to give you money when they know they may be looking at another indictment right down the road, although, that might be able to be worked out. I am not discounting it.

Senator ARMSTRONG. Was that what the earlier witnesses were suggesting? Or were they suggesting simply to give a right to the defendant in that case to bring a lawsuit for the recovery of it?

Mr. VACHA. When it gets to that point. That one is very troublesome, practically, because if a defendant is allowed to bring a lawsuit, he brings a civil suit. That means the Government then has all the rights of civil discovery, and they will be able to depose that witness. They can depose Mr. Kilpatrick. No criminal lawyer worth his salt, in his right mind, is going to let them have another shot at the testimony of his client. I would never do it. In other words, if you have won, get out. If you go back in, he has to go back in, and civil discovery is very broad, and the first thing they will do is bring in your client and get him to testify. If he doesn't testify, he will lose his lawsuit.

So, that is a very practical question.

Senator ARMSTRONG. In other words, do you think in most cases it would not provide a real remedy?

Mr. VACHA. Allowing him to bring the suit, it wouldn't, because if the criminal lawyer has his way, he would say, "No way am I going to allow that man to testify." I wouldn't allow Kilpatrick to testify.

Senator ARMSTRONG. Then what is the answer? You mentioned that you were attracted to the idea of it.

Mr. VACHA. I think in some situations the judge ought to be allowed to do it. There has to be a more thorough examination. This is too superficial of an examination to do that. I think the judge ought to be allowed to do that in outrageous cases. But we have to examine that some more, and there should be some more experts. I just heard this suggestion this morning.

Keep in mind, when does that right occur? When does the suit become final? Because unless the judge dismisses the case with prejudice and says, "You can't bring it again," the case is not final.

So, the right for him to bring his suit has to be final, and there has to be some study about that. So, it is not an easy answer.

Senator ARMSTRONG. Has anybody done any study on that kind of thing?

Mr. VACHA. I don't know, sir. I don't know.

Senator ARMSTRONG. The subject is at least superficially interesting, and it is one that I have heard mentioned not only in reference tion with criminal prosecutions such as this but other kinds of Government actions, the idea that if the Government goes out and harasses people, and it turns out that they were really off the mark—I am not talking about the close call, and the Government acted in good faith, but where you have the kind of showing that you have in the *Kilpatrick* case or in the *Omni* case. Ann, was it a Utah case that involved breaking into the mails? Or in New York. Anyway, where a court finds clear cases of misconduct, and then we have somebody like Mr. Kilpatrick come in and say, "Well, it cost me $6 million." There ought to be some mechanism there.

Everything you said about the difficulty sounds completely right to me, but I don't know how to fix it. But something should be done.

Mr. VAIRA. There is a way to do that; there is a way to get around it, but it is going to take some study and get passed some initial questions.

Senator ARMSTRONG. Is that the kind of thing that, for example, if nobody else were doing it, if this committee were to send a letter to the bar association and say, "Why don't you put out a task force to figure that out," is that the kind of thing your people do?

Mr. VAIRA. Oh, sure. In fact, I would invite that. I think the ABA could do that.

I am on the Criminal Justice Council of the ABA, and if you send a letter to me, I will take it, and I will do something with it.

Senator ARMSTRONG. We might do that, and we may just ask the Justice Department to look at it, too.

Despite the fact that I guess I have hinted I am critical of what the Justice Department has done, I don't intend to approach the Department of Justice as an adversary. I am going to start with the assumption that they will be just as eager or more eager than I am to correct any past wrongdoings and to manage their business in a way that will be fully protective of the taxpayers' rights.

So, it may well be that they will be prepared to suggest some approach to this problem. I mean, they said they might "circle the wagons," but they may not, too.

Mr. VAIRA. I think that the approach would have to come from outside, though. I think we would have to make the suggestion. I don't think the Department of Justice psychologically, philosophically, would be the one to suggest that. It has to come from somebody else. And either they object or don't object. And I think that is the way to start it. And we would be glad to start it.

Senator ARMSTRONG. I think that would be great.

Mr. VAIRA. All right.

Senator ARMSTRONG. If you like, we will send a letter asking the ABA's views on that subject in an official way.

Mr. VAIRA. That is a great idea.

Senator ARMSTRONG. Thank you.

Mr. VAIRA. I have heard some comments about the Department of Justice making their internal investigation. I am disturbed at what I heard, because when I was in office I had a great amount of respect for them. I know that Mike Shaheen, who was the head of the Professional Responsibility Office, once issued a damning report about the Attorney General of the United States, and, just recently indicted an FBI agent in this type of case.

If things aren't going well, I would suggest that you ask for Mr. Shaheen, who is a good lawyer, and ask him hard questions, as you suggested you would do. He is the one to ask. I think he himself has proposed for a long time that the Department of Justice have an inspector general, as many other agencies do, who would be independent. In other words, the OPR is not in that position; it doesn't have that independence, although I believe it has the makings of that. That might be something to explore with them.

All other agencies—the Department of Defense, and HHS, all the big agencies—have inspectors general who do not answer to anybody except the President of the United States. They are Presidential appointees. They are on the same par as the man they work for. That is a suggestion that would give you that independence.

I was surprised when I heard this, disturbed that nothing has been done. I don't know the facts, but if you get Mike Shaheen here, I would suggest that you ask him the hard questions.

Senator **ARMSTRONG**. Good. Thanks. A good idea.

Mr. **VAIRA**. The problem that occurred in this case, the "agents of the grand jury," that is a term that has been misused, and the Department of Justice or the Tax Division misuses it all the time.

Anytime the agent is working with the prosecutor—FBI agents, the Secret Service, and so forth—they are still special agents of the United States. They don't have any special mystical powers. They don't have to be called in and be brought before the grand jury like some college initiation to some fraternity and have said, "You now represent the grand jury." That is all a bunch of hocum. There is no such animal as a grand jury agent.

Where the confusion comes, and this is how they misunderstand it, is that every now and then the grand jury needs to have somebody look over records. Grand juries don't examine volumes of records. And they take the records and give them to the agency that is doing it, and if they have accountants they would do it under the normal guise of being an expert witness, and they come back in and do it.

Somehow or other that particular procedure has become confused, that that person who is getting these records is some sort of an agent. Well, as to that, he is simply given records to look at and shows up as a witness, because with this grand jury material they are looking at, they have a hard time giving it to outsiders, giving it to somebody who is not in the Government. The Federal rules prohibit that, although there may be ways to get around that. But that is where that crazy system has come up.

Senator **ARMSTRONG**. Well, Mr. Vaira, I may have misunderstood this—and I know as little about grand juries as you know a lot—but what I understood the two abuses to be that were identified under the general heading of "agents of the grand jury" were a little different from what you have addressed.

Mr. **VAIRA**. Oh, yes. They were different. They were different. I am just saying that is why this concept has gotten out of focus.

Senator **ARMSTRONG**. Well, the things that I understood I was supposed to be concerned about are, first, that the grand jury is told that the person who is appearing before them summarizing evidence, and so on, is an agent of the grand jury, and therefore, the grand jurors give to that person a credibility and a sense of impartiality that they might not if what they were told is, "This guy works for the IRS and he is trying to make a case against Taxpayer Smith."

Mr. **Vaira**. That is correct.

Senator **Armstrong**. That that was abuse No. 1.

Abuse No. 2, which came to my attention I think in the testimony of Judge Winner, was when they put somebody before the grand jury who was a defense lawyer and swore him to secrecy, and put him in a box where, if I understood the testimony of the judge correctly, he was put in a situation where he either had to violate his commitment to his client or violate the oath of secrecy. I don't know how often that happens, but I can see that that would be a very difficult bind.

Mr. **Vaira**. The two experiences you related, I understand that occurred, and that should not have occurred. The agents in this case got some idea that they have some special mantle.

I am not saying it is done every day, but it is not unusual in areas where—well, let us put it this way: It doesn't happen to FBI agents. They know who they work for.

But if you get agents such as agents for the inspectors general—I remember talking to an agent for inspectors general who have power to investigate fraud, waste, and abuse. One told he he had just been assigned as an agent of the grand jury. That is absurd. That simply has got to stop. They will go out and serve subpoenas under the guise that, "Hello, I am an agent for the grand jury." That can be corrected.

That can be corrected pretty fast by the Department of Justice and at various agencies. That could be corrected within a month. But I think an admonition from your committee could do it; I don't think any legislation is necessary.

But I am saying that misconception is floating around, especially among agencies that don't work with the grand jury a lot.

As I say, the FBI has no problem with that. They know and have known for a long time who their boss is.

Senator **Armstrong**. Is there anything else among the recommendations that have been presented that you disagree with? I have noted and will pursue your disagreement about moving criminal investigations to the FBI, and also your reservations about the method by which defendants might be able to seek compensation for attorneys fees or damages. Is there anything else that, as you have listened to this day's testimony, you would like to bring up?

Mr. **Vaira**. Nothing else, except that I believe I am disturbed when I hear about the Department not doing its own internal investigation, and I think you ought to pursue those questions with Michael Shaheen.

I have written an article on the subject of the role of the prosecutor inside the grand jury. It is 75 Journal of Criminal Law and Criminology. I would like to make it part of the record. It takes up a lot of these questions and deals with just how much is necessary for a court to find prosecutorial abuse, what the remedies are, and what are some of the things that the grand jury or the courts supervising the grand jury can do. It pretty much outlines a lot of the areas, not specifically to some of these, but it certainly touches upon it, and I would like to make it part of the record. I don't have it with me, but I would like to send it to the committee.

Senator **Armstrong**. I would be very grateful if you would.

Mr. **Vaira**. Thank you.

[The information follows:]

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# THE ROLE OF THE PROSECUTOR INSIDE THE GRAND JURY ROOM: WHERE IS THE FOUL LINE?

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## I. Introduction

The historic role of the English grand jury, as it eventually evolved, was to act as an independent bulwark to protect English subjects from unfounded accusations by the crown.[1] The English colonists in America established the grand jury with the same powers as its English model.[2] The framers of the United States Constitution made the grand jury a part of the fifth amendment.[3] The purpose of the constitutional provision was to protect the citizens "against unfounded accusation, whether it comes from [the] government, or [is] prompted by partisan passion or private enmity."[4]

During the past decade, the grand jury has been criticized as no longer being an independent body, but simply a rubber stamp of the prosecutor.[5] Despite the criticism, the grand jury as an institution is not likely to be abolished because it occupies a strong constitutional position.[6]

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[1] *In re* Russo, 53 F.R.D. 564, 568 (C.D. Cal. 1971).

[2] The famous case of newspaper publisher John Peter Zenger is a prime example. Two grand juries refused to indict Zenger on charges brought by the governor of New York for criticizing the governor's policies. He was later prosecuted on an information and acquitted. M. Frankel & G. Naftalis, The Grand Jury: An Institution on Trial 11 (1977).

[3] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. Const. amend. V.

[4] *Ex parte* Bain, 121 U.S. 1, 11 (1887).

[5] *See* United States v. Provenzano, 440 F. Supp. 561, 564 (S.D.N.Y. 1977); 8 Moore's Federal Practice § 6.02[1], 6-22 (rev. 2d ed. 1985); M. Frankel & G. Naftalis, *supra* note 2, ch. 2. The Supreme Court also has expressed some doubt concerning the independence of the grand jury: "The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor . . . ." United States v. Dionisio, 410 U.S. 1, 17 (1973).

Another historic function of the grand jury is its power to summon witnesses.[7] This power remains intact today. Although often criticized as being too broad,[8] the subpoena power of the grand jury is protected and valued by the courts: "The inquisitorial power of the grand jury is the most valuable function which it possesses today and, far more than any supposed protection which it gives to the accused, justifies its survival as an institution."[9] Courts have consistently refused to limit the broad, sweeping investigatory powers of the grand jury.[10]

The grand jury remains one of the most effective methods in a criminal investigation for compelling the appearance of witnesses and the production of documents. The author is of the opinion that without the investigatory power of the grand jury, successful investigations of official corruption, large scale financial fraud, or organized crime would be dramatically reduced.

The importance of the investigative role of the grand jury, however, must not be permitted to overshadow its role as an independent accusatory body. A balance must be maintained between the two roles. The key to the balance lies with the integrity and the professionalism of the prosecutor.[11]

The prosecutor's role is crucial to the operation of the modern grand jury. The prosecutor decides what subjects the grand jury investigates, and what witnesses and documents to subpoena. He questions the witnesses. He advises the grand jury on the relevance of the evidence, drafts the charges, advises the grand jury on the law, and requests the grand jury to return an indictment.[12] The grand jury cannot return an indictment without the signature of the prosecutor.[13] This power can easily be misused.[14]

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[6] England has abolished the grand jury. Administration of Justice Act of 1933, 23 & 24 Geo. 5, c. 36; McCormick on Evidence, ch. 12, § 113, at 276 (3d ed. 1984).

[7] "[A]s early as 1612, in the Countess of Shrewsbury's case, Lord Bacon is reported to have declared that 'all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery.'" Blair v. United States, 250 U.S. 273, 279 (1919).

[8] *See Dionisio*, 410 U.S. 1 (1973) (Brennan, Douglas & Marshall, JJ., dissenting); United States v. Mara, 410 U.S. 19, 22, 23, 31 (1973) (Brennan, Douglas & Marshall, JJ., dissenting).

[9] *In re* Grand Jury Proceedings, 4 F. Supp. 253, 284 (E.D. Pa. 1933).

[10] A grand jury needs no probable cause to initiate an investigation. The investigation may be triggered by tips, rumors, or evidence given by the prosecutors. Branzburg v. Hayes, 408 U.S. 665, 701 (1972). A grand jury investigation cannot be enjoined. *In re* Grand Jury Proceedings (U.S. Steel), 525 F.2d 151, 157 (3d Cir. 1975). The grand jury's right to inquire into possible offenses is unrestrained by technical or evidentiary rules. United States v. Calandra, 414 U.S. 338, 343 (1974).

A witness cannot quash a grand jury subpoena on the grounds that the witness will assert the fifth amendment. The witness must appear and assert the privilege as to each question asked. United States v. Pilnick, 267 F. Supp. 791, 798 (S.D.N.Y. 1967). A witness may not refuse to answer questions on the grounds of relevance. *In re* Fula, 672 F.2d 279, 283 (2d Cir. 1982). Although a grand jury subpoena *duces tecum* may be quashed by the court for being unreasonable or oppressive, courts are very liberal in upholding the demands of subpoena *duces tecum*. *See, e.g.*, *In re* Borden Co., 75 F. Supp. 857 (N.D. Ill. 1948).

[11] Prosecutors have an ethical obligation to preserve the status of the grand jury as an independent legal body. United States v. Hogan, 712 F.2d 757, 759 (2d Cir. 1983);

The vast discretion vested in the prosecutor and the proceedings inside the grand jury have received little judicial attention.[15]

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American Bar Ass'n, Standards for Criminal Justice, Standard 3-3.5 at 3.48 (2d ed. 1980).

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

[12] United States v. Chanen, 549 F.2d 1306, 1312 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977); 8 MOORE'S FEDERAL PRACTICE § 6.02[1] (rev. 2d ed. 1985); 1 WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d §101 (1982); Note, *The Grand Jury As An Investigative Body*, 74 HARV. L. REV. 590, 596 (1961).

[13] Smith v. United States, 375 F.2d 243, 247 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *In re* Grand Jury Jan. 1969, 315 F. Supp. 662, 673 (D. Md. 1970).

[14] "Indeed, a sophisticated prosecutor must acknowledge that there develops between a grand jury and the prosecutor with whom the jury is closeted a rapport—a dependency relationship—which can easily be turned into an instrument of influence on grand jury deliberations." FED. R. CRIM. P. 6(e)(1) advisory committee notes (1979 amend.).

[15] Prior to 1979, the prosecutor's activity inside the grand jury room was largely a mystery to anyone except those persons in the prosecutor's office. The Federal Rules of Criminal Procedure did not require grand jury proceedings to be transcribed, although several district courts passed local rules to require recording. Northern District of Illinois, Local Rule 1.04(c); Northern District of Ohio, Local Rule 3(c). In United States v. Gramolini, 301 F. Supp. 39, 42 (D.R.I. 1969), the court held that indictments would be dismissed if proceedings were not recorded. Although the practice of nonrecording was upheld by a vast majority of courts, *see* WRIGHT, *supra* note 12, at § 103.1, the practice was strongly condemned.

In 1979 Rule 6(e) of the Federal Rules of Criminal Procedure was amended to require all proceedings before the grand jury to be recorded.

> All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

FED. R. CRIM. P. 6(e)(1).

The advisory committee noted that one of the benefits derived from recording was

This Article will explore the role of the prosecutor inside the grand jury room, and attempt to establish some parameters for his activity. The Article will attempt to define the gray area between proper and improper prosecutorial conduct.

This Article also will examine the restrictions on the use of hearsay evidence; the limitations on the use of transcripts from prior grand juries; the limitations on the prosecutor's examination of recalcitrant witnesses; the prosecutor's duty to present exculpatory evidence; the extent to which the prosecutor may make an opening statement or a final argument; whether or not the prosecutor is required to advise the grand jury on the relevant law; and the manner in which allegations of prosecutorial misconduct or other improprieties should be raised.

Although the grand jury is a body independent of the courts and the executive branch, the courts have an inherent supervisory authority over the grand jury's operation.[16] The court has authority to review the proceedings of a grand jury that it has empaneled and instructed[17] in order to prevent the grand jury's independence from being subverted.[18] The court also has the power to supervise the use of subpoenas and to oversee the general operation of the grand jury.[19] This supervisory authority is exercised carefully lest the court disturb the prerogatives of the executive branch and the

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"restraining prosecutorial abuses before the grand jury." Fed. R. Crim. P. 6(e)(1) advisory committee notes (1979 amend.).

[16] United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976). The Supreme Court urged lower courts to use supervisory power when there is a threat "to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." Ballard v. United States, 329 U.S. 187, 195 (1946).

[17] United States v. O'Shea, 447 F. Supp. 330, 332 (S.D. Fla. 1978).

[18] United States v. Al Mudarris, 695 F.2d 1182 (9th Cir.), *cert. denied*, 103 S. Ct. 2097 (1983); *Chanen*, 549 F.2d 1306 (9th Cir. 1977).

Supervisory authority has been exercised to insure uniformity in warnings given to putative defendants testifying before the grand jury, *Jacobs*, 547 F.2d 772 (2d Cir. 1976); to insure uniformity of procedures for taking guilty pleas, Burton v. United States, 483 F.2d 1182 (9th Cir. 1973); and, to reverse a conviction that resulted from an indictment returned by a grand jury from which women were intentionally excluded, *Ballard*, 329 U.S. 187 (1946). *See* Note, *The Supervisory Power of the Federal Courts*, 76 Harv. L. Rev. 1656 (1963).

[19] *In re* Seiffert, 446 F. Supp. 1153, 1155 (N.D.N.Y. 1978). The courts have the power to establish procedures to insure uniformity in hearing allegations regarding grand jury investigations. For example, the District Court of the Eastern District of Pennsylvania has established a procedure whereby each grand jury investigation is assigned a number by the clerk of the court. All subpoenas issued during that investigation are given the same number. Any challenges to a subpoena or any irregularity alleged in the investigation are assigned to be heard by a judge chosen by lot. All litigation from the numbered investigation will be assigned to the same judge so that the judge will have familiarity with the investigation and will maintain close supervision. *See* Local Criminal Rule 4, E.D. Pa.

grand jury[20] and upset the doctrine of separation of powers.[21]

## II. OPENING STATEMENT

At the beginning of every grand jury investigation, it is necessary for prosecutors to outline the purpose of the investigation, the violations of the law that are suspected of having been committed, what witnesses will be called, and what direction the investigation will take. As the investigation progresses, it may be necessary for prosecutors to brief the grand jury on new areas that will be pursued. The prosecutors must explain the relevance of each witness and what they hope the questioning will reveal.[22]

Although there are no cases directly discussing whether prosecutors can make a statement to the grand jury at the beginning of an investigation or prior to the appearance of a witness, it is implicit from their role as directors of the investigation that they keep the grand jury informed. They must caution the grand jurors that the jurors alone must determine if probable cause exists, and that they alone should make such a determination from the evidence they hear, and not from the prosecutors' statements.[23] The prosecutors should not voice their personal opinion as to the guilt or innocence of the prospective defendants.[24]

## III. THE QUESTIONING OF WITNESSES

Quite often in complicated fraud, political corruption or organized crime cases, the only witnesses to the crime are persons who committed it or persons who have a personal, political or business relationship with the major figures in the scheme. These individuals are reluctant to testify, even when granted immunity from prosecution.[25] Evasive answers often cause the government attorney to become frustrated. Numerous cases involving prosecutorial misconduct have resulted when the prosecutor badgered, insulted or threatened witnesses in an attempt to force them to testify truthfully and in a straightforward manner. In earlier cases, although often strongly criticizing a prosecutor's conduct for mistreating a witness, courts have refused to intercede if there was sufficient evidence to sustain a guilty finding.[26] As the grand jury was increasingly used to conduct lengthy investigations involving more complex evidence and more reluctant witnesses, however, the prosecutor's conduct came under closer scrutiny.

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[20] United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979).

[21] *Chanen*, 549 F.2d 1306 (9th Cir. 1977).

[22] 8 MOORE'S FEDERAL PRACTICE § 6.04[1], 6-78 (rev. 2d ed. 1985).

[23] United States v. Rintelen, 235 F. 787, 791 (S.D.N.Y. 1916). *See* United States v. United States District Court, 238 F.2d 713, 721 (4th Cir. 1956), *cert. denied*, 352 U.S. 981 (1957) (court approved summary argument at close of evidence).

[24] U.S. v. McKenzie, 678 F.2d 629, 633 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982).

[25] Title 18 of the United States Code, Section 6001-004, permits the government attorney to seek a court order to force a witness to testify over the witness' assertion of the fifth amendment. 18 U.S.C. § 6001-004 (1982). The witness' testimony, and any leads resulting therefrom, cannot be used against him. *See* Kastigar v. United States, 406 U.S. 441 (1972). If the witness refuses to testify, he may be held in civil contempt and incarcerated until he complies or the grand jury expires. He may not be incarcerated longer than 18 months. 28 U.S.C. § 1826(a) (1982).

Courts have defined two criteria for determining the effect of prosecutorial misconduct. Some courts have held that in order to dismiss an indictment the court must find an actual prejudice to the defendant.[27] Other courts have applied the cumulative error rule, finding that the court's supervisory powers may be invoked without a showing of actual prejudice, where the prosecutor's unethical conduct has become a common practice within the district or the circuit. For example, the Third Circuit Court of Appeals said that "[federal] courts have an institutional interest, independent of their concern for the rights of the particular defendant in preserving and protecting the appearance and the reality of fair practice before the grand jury, an interest which could justify the imposition of a prophylactic rule in a proper case."[28] The cumulative error rule is invoked when: "The cumulative effect of the . . . errors and indiscretions, none of which alone might have been enough to tip the scales, operated to the defendants' prejudice by producing a biased grand jury."[29] Under either standard, if the overall conduct of the prosecutor is sufficiently egregious, courts will find prejudice from the fact that the independence of the grand jury was destroyed.[30]

The prosecutor may ask "hard" questions of a witness with the intent of obtaining information. When the prosecutor deviates from that goal, and uses his questions as a method of voicing his own opinion or making an argument to the grand jury, he strays into the area where courts are likely to find prosecutorial misconduct. In

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[26] United States v. Riccobene, 451 F.2d 586, 587 (3d Cir. 1971); United States v. Bruzgo, 373 F.2d 383 (3d Cir. 1967).

[27] United States v. Adamo, 742 F.2d 927, 941 (6th Cir. 1984); *McKenzie*, 678 F.2d at 631 (5th Cir. 1982). *See also* United States v. Morrison, 449 U.S. 361 (1981), where federal agents visited defendant after her indictment without informing her lawyer and told defendant that her lawyer was incompetent and that she would fare better with another lawyer. The defendant continued to retain the lawyer. The Supreme Court found that although the agents' activity was egregious it did not prejudice the defendant.

[28] United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979).

[29] *Samango*, 607 F.2d at 884 (9th Cir. 1979).

[30] *Id.*

*United States v. Serubo*,[31] the prosecutor, frustrated by the lack of knowledge of the witnesses, continually used rhetorical questions to link the targets[32] of the investigation to organized crime and to impugn the integrity of the witnesses. The witnesses did not supply information in response to his questions. The court found that such conduct was egregious enough to invoke the supervisory power of the court to grant relief.[33]

The prosecutor is not prohibited from offending the witness. In the words of Judge Learned Hand: "I agree that, when faced with a patently unwilling witness, the grand jury was free to press . . . [the] cross examination hard and sharp; truth is more important than the sensibilities of the witness."[34]

The prosecutor cannot degrade the witness, and the questions should relate directly to a fact in question. In *United States v. DiGrazia*,[35] the court dismissed an indictment when the prosecutor asked a woman target if her son, another target, was legitimate, and chided her for asserting the fifth amendment. The court held that the examination was conducted merely to discredit the witness before the grand jury.[36]

A particularly troublesome situation which has given rise to numerous findings of prosecutorial misconduct is the examination of a witness who originally agreed to cooperate but later declines to do so. The prosecutor's frustration with the witness frequently appears in his remarks and questioning, which some courts often have found prejudicial. In *United States v. Samango*,[37] before questioning the defendant, the prosecutor, who had agreed not to prosecute the defendant, made a long and heated statement to the grand jury about his dissatisfaction with the defendant's prospective testimony. The prosecutor made references to the defendant's acquaintance with a person whom the prosecutor described to the grand jury as being capable of murder. He frequently insinuated that the defendant was lying, and bickered over the defendant's failure to cooperate in a satisfactory manner. The Ninth Circuit found that the questioning was calculated to serve no other purpose than to prejudice the defendant in the eyes of the grand jury.[38]

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[31] 604 F.2d 807 (3d Cir. 1979).

[32] A "target" is a person who, in the judgment of the prosecutor, is a putative defendant. United States Attorneys' Manual, tit. 9, ch. 11.250.

[33] Because the indictment was returned by a second grand jury rather than the one before which the initial questioning took place, the court, instead of dismissing the indictment remanded the case to enable the lower court to determine if the conduct continued into the second grand jury. *Serubo*, 604 F.2d at 818.

[34] United States v. Remington, 208 F.2d 567, 571-72 (2d Cir. 1953) (L. Hand, J., dissenting), *cert. denied*, 343 U.S. 907 (1954). After making this statement, however, Judge Hand found that the prosecutor had gone beyond the bounds of fairness.

[35] 213 F. Supp. 232, 234-35 (N.D. Ill. 1963).

[36] *Id.* at 235.

[37] 607 F.2d 877 (9th Cir. 1979).

When faced with hostile witnesses, the prosecutor should not attempt to establish probable cause simply by discrediting them or entering into long heated arguments with them during questioning. In *United States v. Sears, Roebuck and Company*,[39] the prosecutor questioned employees and attorneys of the defendant company in a manner which implied that the company had totally failed to respond to a subpoena. He badgered lawyer witnesses who requested time to secure counsel. He made a long statement to the grand jury on the credibility of a witness. He constantly demanded yes or no answers to complex questions that were not susceptible of one word answers, and told a witness that he sounded "like an Abbott and Costello movie."[40] The court branded the prosecutor's efforts as "blind zeal" that resulted in basic unfairness of the grand jury proceeding and dismissed the indictment.[41]

A majority of the Ninth Circuit found the prosecutor's conduct "deplorable," but reinstated the indictment because the defendant could show no prejudice which would amount to a violation of the constitutional requirement of indictment by an independent grand jury.[42] Judge Norris, dissenting in part, felt that the lower court should have the opportunity to consider exercising its supervisory power to dismiss the indictment.[43] Upon remand, the district court dismissed the indictment pursuant to its supervisory power.[44]

Similarly, in *United States v. Lawson*,[45] the court dismissed the indictment where the prosecutor, although possessing records that corroborated the witness' testimony, embarked on a searing examination designed to discredit the witness so that it would appear that he was covering up for the defendant.

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[38] *Id.* at 883.

[39] 518 F. Supp. 179 (C.D. Cal. 1981), *rev'd*, 719 F.2d 1386 (9th Cir. 1983).

[40] *Id.* at 187.

[41] *Id.* at 190.

[42] *Sears, Roebuck and Co.*, 719 F.2d 1386, 1392 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1441 (1984). The court held that the constitutional requirement arose not from the fifth amendment's due process clause, but from the grand jury clause.

> Although the constitutional concept of "fundamental fairness" has sometimes been analyzed as an aspect of due process, *see, e.g.*, United States v. Basurto, 497 F.2d 781, 785 (9th Cir. 1974), it accords both with prevailing precedent and with the language of the Constitution to treat the right to unbiased treatment by a grand jury as one grounded in the grand jury clause of the Fifth Amendment.

*Id.* at 1391 n.7.

[43] *Id.* at 1394.

[44] *Sears, Roebuck and Co.*, 579 F. Supp. 1055, 1056 (C.D. Cal. 1984).

[45] 502 F. Supp. 158 (D. Md. 1980).

Implicit in the foregoing cases is a conception by the courts that prosecutors in the past have taken advantage of their powerful position with the grand jury. The courts intend to insure that such practices do not reoccur.

## IV. THE NATURE OF GRAND JURY EVIDENCE

In *Costello v. United States*,[66] the Supreme Court held that an indictment cannot be attacked on the ground that evidence presented before the grand jury was incompetent or inadequate. The Court would not permit a series of hearings or mini-trials to determine if the jury correctly found probable cause. The Court approved an indictment based solely upon hearsay testimony.

Despite the holding in *Costello*, lower courts have dismissed indictments when they found that the grand jury was misled as to the nature and the quality of the evidence presented by the prosecutor. The courts have decided the cases on due process grounds or pursuant to their supervisory authority. Courts also have dismissed indictments on due process grounds when it became known that the indictment was based upon perjured material testimony.[67]

The use of hearsay evidence, however, has presented problems. Indictments have been dismissed when based solely upon the unsworn statements of the prosecutor.[68] The Second Circuit, in the first of several cases on the issue, dismissed an indictment where the witness testifying had no firsthand knowledge of the events he related, but testified as if he were an on-the-scene witness.[69] The court objected to the prosecutor's misleading the grand jury to believe that it was receiving firsthand testimony.[70]

In a later case, the same court issued the following warning to prosecutors:

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[66] 350 U.S. 359 (1956).

[67] *Basurto*, 497 F.2d 781 (9th Cir. 1974); United States v. Goldman, 451 F. Supp. 518 (S.D.N.Y. 1978). *But see Adamo*, 742 F.2d at 941 (6th Cir. 1984) (conviction upheld where perjury was not fault of prosecutor and perjured testimony was not used at trial). The court in *Adamo* held that if the prosecutor discovers perjury prior to trial, he must determine if a petit jury would convict without perjured testimony. If in doubt, he must resubmit the remaining evidence to the grand jury. If the remaining evidence would not convict, he must dismiss the indictment.

[68] *See* United States v. Hodge, 496 F.2d 87 (5th Cir. 1974).

[69] United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972).

[70] The court stated:

> We have been willing to allow ample . . . latitude in the needless use of hearsay, subject to only two provisos—that the prosecutor does not deceive grand jurors as to the "shoddy merchandise they are getting so they can seek something better if they wish," . . . or that the case does not involve a "high probability that with eyewitness rather than hearsay testimony the grand jury would not have indicted."

*Id.* at 1137 (quoting United States v. Payton, 363 F.2d 996, 1000 (2d Cir. 1966)).

> *Although there is no prohibition on the use of hearsay evidence before a grand jury . . . [e]xcessive reliance on hearsay testimony is disfavored. More particularly, the government, as prosecutor, in presenting hearsay evidence to the grand jury, must not deceive the jurors as to the quality of the evidence they hear. . . . Hearsay (or secondary evidence) is disfavored generally because it is not first-rate proof. It should not be used without cogent reasons . . . and never be passed off to the grand jurors as quality proof when it is not.*[illegible]

But determining what is an excessive or misleading use of hearsay testimony is a difficult task because each case depends upon the individual factual circumstances. As a practical matter, the prosecutor may use hearsay in many instances that are not misleading or prejudicial. For example, a hearsay witness may report facts that are not subject to dispute, or a witness who [illegible] to one of many [illegible] may not have his credibility seriously drawn into question. It is a common practice for one law enforcement agent to relate the findings of one or more other law enforcement agents where the appearance of all agents would be time consuming and unnecessary.[illegible]

If the government's case depends upon consistent testimony of certain key witnesses, the witnesses should be presented so that the grand jury may judge their credibility. In *United States v. Provenzano*,[illegible] the court dismissed an indictment that was based solely upon the incriminating testimony of one witness. The grand jury did not hear or see the witness, but was given a transcript of the testimony from a prior grand jury. This circumstance was aggravated because the witness had partially recanted his incriminating testimony in a private letter to the prosecutor.[illegible] The court held that the grand jury was misled and should have been given the opportunity to see the "doubtful merchandise they were getting."[illegible]

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[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

As a general rule, evidence of a defendant's bad reputation in the community or of his implication in other crimes is unnecessary to the grand jury. Presentation of such information through hearsay testimony of law enforcement agents or by hearsay statements by the prosecutor himself has resulted in the dismissal of the indictment and harsh criticism by the court.[56]

The prosecutor has traditionally used hearsay evidence by presenting transcripts of prior grand jury testimony. The practice is common, often dictated by the expiration of a grand jury's term before an indictment can be returned, or by a grand jury that is occupied with other matters. The practice has been approved by numerous courts.[57] The Supreme Court has formalized the procedure for release of information from one grand jury to another.[58] The practice has some danger. The selective use of incomplete or inaccurate summaries may void an indictment.[59] Courts also have condemned the prosecutor's use of transcripts where the transcript conceals infirmities in the prosecutor's evidence or prevents the grand jury from seeing and hearing an important witness.[60]

There is no hard or fast rule concerning the use of summaries of prior grand jury transcripts. As a rule, any key witnesses should be brought before the new grand jury, especially if there is some credibility problem that could be solved by their appearance and by giving the grand jury the opportunity to ask questions. If the transcripts are lengthy, they should be summarized by a witness.[61] This practice is preferred to presenting the grand jury with volumes of transcripts and expecting all twenty-three members to study them in the short span of a grand jury session.

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[56] *See Hogan*, 712 F.2d at 761. The court said:

> [T]he impartiality and independent nature of the grand jury was seriously impaired by the AUSA's argument that Hogan [the defendant] was a real hoodlum who should be indicted as a matter of equity. . . . Added to this inflammatory rhetoric were numerous speculative references to other crimes of which Hogan was "suspected." None of these other crimes . . . was under investigation. . . . In fact, there is no indication that Hogan has ever been charged with these offenses by any state or federal body. These government accusations and others appear to have been made, not to support additional charges, but in order to depict appellants as bad persons and thereby obtain an indictment for independent crimes. This tactic is "fundamentally unfair."
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> . . . .
>
> . . . [T]he incidents related are flagrant and unconscionable.

*Id.* at 761-62.

[57] *See, e.g.*, United States v. Barone, 584 F.2d 118 (6th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); United States v. Brown, 574 F.2d 1274 (5th Cir.), *cert. denied*, 439 U.S. 1046 (1978); *Chanen*, 549 F.2d 1306 (9th Cir. 1977); United States v. Gaskill, 491 F.2d 981 (8th Cir. 1974); United States v. Linton, 502 F. Supp. 861 (D. Nev. 1980).

[58] Fed. R. Crim. P. 6(e)(3)(C)(iii).

[59] United States v. Mahoney, 508 F. Supp. 263 (E.D. Pa. 1981). The extensive use of summaries has been condemned as a technique. *See, e.g.*, United States v. Braniff Airways, Inc., 428 F. Supp. 579 (W.D. Tex. 1977); *In re* May 1972 San Antonio Grand Jury, 366 F. Supp. 522 (W.D. Tex. 1973); *In re* Grand Jury Investigation of Banana Industry, 214 F. Supp. 856 (D. Md. 1963).

[60] *Provenzano*, 440 F. Supp. 561 (S.D.N.Y. 1977). "The use of summaries allows the government to present evidence which 'appears smooth, well integrated and consistent in all respects. . . . [G]rand jurors do not hear cases with the rough edges that result from the often halting, inconsistent and incomplete testimony of honest observers of events.'" *Mahoney*, 508 F. Supp. at 266 (quoting United States v. Arcuri, 282 F. Supp. 347, 349 (E.D.N.Y. 1968)).

The problems with transcripts of prior grand jury proceedings are illustrated in *United States v. Gallo*,[62] where the prosecutor presented the grand jury with a superceding[63] indictment to correct certain legal problems in the prior indictment. The grand jury was not the same one that returned the first indictment. The evidence presented consisted only of transcripts of the testimony of the witnesses before the first grand jury. The prosecutor did not tell the grand jury that the testimony of a key witness included in the transcript contained some contradictory statements as to crucial events. The grand jury which returned the first indictment had been aware of the problems and had seen and heard the witness. The prosecutor did not give the second grand jury any guidance as to use of the transcript. The court faulted the prosecutor for not informing the grand jury that the witness was available and could be called to testify if the grand jury wished to hear him. The court held that, at a minimum, the prosecutor should have given the grand jury some direction as to how to use the transcripts.[64]

The Ninth Circuit dismissed an indictment under similar factual circumstances,[65] but reversed the dismissal of an indictment in another case where the transcripts were read aloud and the grand jury was made aware of the prior inconsistent statements of the witnesses.[66]

The prosecutor must take a common sense approach to the presentation of grand jury evidence. He must insure that there is credible evidence on each element of the offense. If a certain element depends upon a key witness, he should present that witness, especially if the witness has credibility problems. The prosecutor also should advise the grand jury that they have the right to call witnesses not heard, or to recall witnesses, and he should give the jurors the opportunity to do so. Presenting witnesses to the grand jury, making the jurors aware of their past convictions and all promises and rewards granted to them by the prosecutor in return for their testimony, will reduce the likelihood of misconduct charges.

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[61] *See Linton*, 502 F. Supp. 861 (D. Nev. 1980).

[62] 394 F. Supp. 310 (D. Conn. 1975).

[63] The procedure whereby the prosecutor submits a revised indictment to the grand jury, making substantive changes in the original charges, or adding new charges.

[64] *Gallo*, 394 F. Supp. at 315.

[65] *Samango*, 607 F.2d at 881.

[66] *Chanen*, 549 F.2d at 1311.

There should be a practical approach to the presentation of hearsay. Hearsay is relied upon by government and business leaders every day to conduct sensitive and important transactions. The weight given to the hearsay varies with the nature of the source of the information and the transaction for which it is used. The prosecutor should determine the necessity of the use of hearsay in the same manner. To be admissible, hearsay should meet the following standard: would a reasonable person rely upon the hearsay in conducting the major affairs of his or her own life?

## V. PROSECUTOR'S DUTY TO PRESENT EXCULPATORY EVIDENCE

The prosecutor is not required to search for or submit to the grand jury evidence favorable to the defendant or negating guilt.[67] He is not required to call to the grand jury's attention "every conceivable discrepancy" in the government's proof.[68] Nor is he required to present evidence which would merely raise issues of credibility or evidence that would not cause a grand jury to refrain from indicting.[69] If, however, the prosecutor is aware of any substantial evidence negating guilt, and the presentation of the evidence might reasonably be expected to cause the grand jury not to indict the defendant, the prosecutor must present that evidence.[70]

Thus, the prosecutor has a great deal of discretion. Courts have ruled, however, that to require the prosecutor to present all evidence that negates culpability or bears upon the credibility of witnesses would turn the grand jury into a mini-trial and away from its function of determining probable cause.[71]

Although the prosecutor need not search for every available bit of evidence favorable to the potential defendant, what if the potential defendant specifically submits the names of several witnesses who he contends will give evidence favorable to him? Some courts have found that potential defendants or other parties have no right to testify before a grand jury.[72] Recently, the Department of Justice revised its policy to require that a potential defendant be notified of his right to appear before the grand jury.[73] In the future, it is likely that a potential defendant's reasonable and specific request that certain witnesses be allowed to testify on his behalf will be granted.

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[67] United States v. Ciambrone, 601 F.2d 616, 622 (2d Cir. 1979).

[68] United States v. Litman, 547 F. Supp. 645, 649 (W.D. Pa. 1982), *aff'd*, 661 F.2d 17 (3d Cir. 1981).

[69] United States v. Lasky, 600 F.2d 765, 768 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979); United States v. Deerfield Specialty Papers, Inc., 501 F. Supp. 796, 804 (E.D. Pa. 1980).

[70] *Ciambrone*, 601 F.2d at 623; United States v. Boffa, 89 F.R.D. 523, 530 (D. Del. 1981).

[71] *Ciambrone*, 601 F.2d at 622; *Litman*, 547 F. Supp. at 649.

If the prosecutor does accede to the defendant's request, he need not present the exculpatory material in the manner requested by the defendant. All that is required is that the prosecutor make the evidence known to the grand jury.[74] In any event, the grand jury should be told that it has the power to call any of the witnesses that are alleged to have exculpatory evidence.[75]

## VI. SUMMARY ARGUMENT

The grand jury investigation may last months, and often more than a year. During the course of the investigation the grand jury may hear numerous witnesses and view hundreds of documents. At the close of the investigation, if the prosecutor decides to seek an indictment, there is a need to summarize the vast amount of evidence so that the jury will understand the relevance of the witnesses and the documents. Although there is very little case law on the subject, sound logic dictates that the prosecutor be permitted to summarize the evidence. In *United States v. United States District Court,*[76] the Fourth Circuit approved the prosecutor's summarizing the evidence. The court quoted with approval an opinion written by Judge August Hand:

> If in a complicated case he [the prosecutor] were not allowed to show the grand jurors the bearing of the evidence upon the alleged violation of the statute, they would certainly be confused as to the entire situation. Even a trained judge is often unable to understand the bearing of relevant testimony without the aid of counsel. Asking the grand jury to find an indictment is but putting in words what every act

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[72] *See* United States v. Smith, 552 F.2d 257, 261 (8th Cir. 1977); United States v. Gardner, 516 F.2d 334, 339 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975); United States v. Fitch, 472 F.2d 548, 549 (9th Cir.), *cert. denied*, 412 U.S. 954 (1973); Gollaher v. United States, 419 F.2d 520, 523 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969); Directory Services, Inc. v. United States, 353 F.2d 299, 301 (8th Cir. 1965).

[73] United States Attorneys' Manual tit. 9, ch. 11.263.

[74] In United States v. Sun Myung Moon, 532 F. Supp. 1360, 1368 (S.D.N.Y. 1982), *aff'd*, 718 F.2d 1210 (2d Cir. 1983) (prosecutor called seven witnesses suggested by defendant and presented affidavits of nine others), *cert. denied*, 104 S. Ct. 2344 (1984).

[75] *See Gallo*, 394 F. Supp. at 315.

[76] 238 F.2d 713, 721 (4th Cir. 1956).

> of the government, and its representatives, means and is well known to mean. What reasonable objection can be urged against allowing the man who has prepared the case to refresh the recollection of the grand jurors by summarizing the evidence taken, perhaps, over weeks or months, and reading from the minutes and giving them a list of the names of the persons charged with the crime? Any objection is really, if not ostensibly, based on the supposition that grand juries are devoid of all independence and prosecuting officers are either tyrannical or dishonest.[77]

The prosecutor must not deviate from a factual presentation. He must refrain from giving his personal opinion as to whether there is probable cause to indict.[78]

## VII. Advice as to the Law

Another area that has received little judicial attention is the instruction of the grand jury on the applicable law. If the jurors must decide whether or not there is probable cause that the defendant violated a federal statute, how much instruction must the grand jury receive on the nature of the crime involved?

Since the purpose of the grand jury is to determine if probable cause exists, courts are hesitant to place upon the grand jury the same requirements for instruction as that of a petit jury. For example, one court has held that an incorrect instruction on the law will not void an indictment by the grand jury.[79]

In a recent case,[80] the Ninth Circuit refused to dismiss an indictment because the grand jury was not instructed on the applicable law. The court said: "[The] indictment is normally prepared by the prosecutor, who is presumably acquainted with the 'applicable law.' . . . We are not persuaded that the Constitution imposes the additional requirement that grand jurors receive legal instructions."[81]

Courts will not presume that the grand jury received inadequate instruction.[82] A mere speculation of irregularity will not suffice to cause the court to examine the grand jury transcript.[83] In *United States v. Hart*,[84] the court found that the indictment returned by the grand jury which listed the elements of the crime indicated that the grand jury was aware of the legal requirements of the statute.

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[77] *United States District Court*, 238 F.2d at 721 (quoting *Rintelen*, 235 F. at 791).

[78] *McKenzie*, 678 F.2d 629, 632 (5th Cir. 1982).

[79] *See* United States v. Felice, 481 F. Supp. 79, 82 (N.D. Ohio 1978), *aff'd*, 609 F.2d 276 (6th Cir. 1979).

[80] United States v. Kenny, 645 F.2d 1323 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981).

[81] *Id.* at 1347.

[82] United States v. Hart, 513 F. Supp. 657, 658 (E.D. Pa. 1981).

[83] *Id.*

[84] *Id.* at 659.

There should be a basic requirement that the grand jury receive some direction as to what law is alleged to have been violated, without requiring that the grand jury receive instructions as complete as those given a petit jury. The modern federal grand jury deals with complicated violations such as income tax evasion,[85] mail[86] and wire fraud,[87] and violations of the Racketeer Influenced Corrupt Organizations Act (RICO),[88] the Hobbs Act,[89] the Extortionate Credit Transactions Act,[90] and the antitrust laws.[91] Unlike common law crimes such as murder, robbery, rape, or arson which are easily comprehended by laymen, these federal crimes are created by statute and contain terms that must be defined before they can be applied intelligently. Without at least a basic explanation of the terms, even a lawyer in some instances would have difficulty applying some of the statutes.[92] Courts have approved both the prosecutor's giving the grand jury the elements of the offense [93] and reading the statute involved.[94]

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[85] 26 U.S.C. § 7201 (1982).

[86] 18 U.S.C. § 1341 (1982).

[87] 18 U.S.C. § 1343 (1982).

[88] 18 U.S.C. § 1962 (1982).

[89] 18 U.S.C. § 1951 (1982).

[90] 18 U.S.C. §§ 891-94 (1982).

[91] 15 U.S.C. § 1, et seq. (1982).

[92] For example, consider reading any of the following statutes to the grand jury without any explanation:

18 U.S.C. § 1341 (mail fraud):

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343 (wire fraud):

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 892 (loan sharking):

> (a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

The courts have not completely faced the problem. A simple solution would be for the courts in each judicial district to approve a unified procedure for advising the grand jury on the law to be followed in all cases. That procedure could take the form of reading the statute involved if it were not a complex violation, or reading the necessary elements of the crime from any approved treatise on instructions. This procedure would assure that the grand jury receives an adequate instruction so that it can carry out its function of determining probable cause, and would reduce claims that the grand jury was misled by the prosecutor.

## VIII. Raising the Issue of Grand Jury Abuse

Following the indictment, if the attorney for the defendant suspects that prosecutorial misconduct has occurred during the investigation, he must sufficiently raise the issue in order to be permitted to examine the transcripts to prove his claim. Courts consistently have refused to release the transcripts of the grand jury on a mere allegation, requiring instead that the defendant show particularized need for the release of the transcripts.[95]

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18 U.S.C. § 891 further defines the terms:

For the purposes of this chapter:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

[93] *See* United States v. Singer, 660 F.2d 1295, 1302 (8th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982); *In re* Terranova, 495 F. Supp. 837, 839 (E.D. Wis. 1980).

[94] *See* United States v. Linetsky, 533 F.2d 192 (5th Cir. 1976); United States v. Slepicoff, 524 F.2d 1244, 1247 (5th Cir. 1975).

[95] *See* United States v. Lame, 716 F.2d 515, 518 (8th Cir. 1983); United States v.

The Seventh Circuit has adopted a procedure whereby a defendant who can make definite allegations of improper conduct may request that the judge examine the grand jury transcripts *in camera* and report if there is any such evidence. If there is evidence, the government is required to acquiesce in the release of the transcripts or suffer a dismissal.[96]

Although no other circuits have adopted this procedure, several courts have examined the transcripts *in camera*, even though they refused to release the transcript to the defendant.[97] The specificity of the allegation necessary to prove particularized need to obtain release of a transcript, or to cause the courts to examine the transcripts *in camera*, is within the discretion of the court[98] and depends upon the factual circumstances of each case.

A sufficient allegation might be raised by submitting affidavits of witnesses who appeared before the grand jury or submitting transcripts of witnesses produced pursuant to the Jencks Act[99] to

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Edelson, 581 F.2d 1290, 1291 (7th Cir.), *cert. denied*, 440 U.S. 908 (1978); United States v. Tocco, 581 F. Supp. 379, 383 (N.D. Ill. 1984); United States v. Pike Industries, Inc., 575 F. Supp. 885, 891 (D. Vt. 1983); United States v. Donohue, 574 F. Supp. 1263, 1266 (D. Md. 1983); *see* 8 MOORE'S FEDERAL PRACTICE § 6.05[3] at 6-114.

The defendant is placed in a dilemma—as stated by Justice Gordon in *United States v. Roethe*, "I appreciate the defendant's dilemma: he wants the grand jury minutes to prove his claim, but he cannot see the minutes until he demonstrates a right to see them." 418 F. Supp. 1118, 1119 (E.D. Wis. 1976).

[96] *Edelson*, 581 F.2d at 1291; Pollard v. United States, 441 F.2d 566, 568 (7th Cir. 1971); United States v. Duff, 529 F. Supp. 148, 156 (N.D. Ill. 1981).

[97] *See, e.g.*, United States v. Shane, 584 F. Supp. 364 (E.D. Pa. 1984); *Donohue*, 574 F. Supp. at 1268; *Litman*, 547 F. Supp. at 650; *Sun Myung Moon*, 532 F. Supp. 1360 (S.D.N.Y. 1982), *aff'd*, 718 F.2d 1210 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 2344 (1984); *Roethe*, 418 F. Supp. at 1119.

[98] *See supra* note 95.

[99] The Jencks Act provides:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
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> (e) The term "statement", as used . . . [above] in relation to any witness called by the United States, means—
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> * * *
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(b) (1982).

It is the author's experience that some courts often order the government to produce the Jencks Act statements prior to the testimony of the witness, or even prior to trial. As a practical matter prosecutors usually comply without taking exception.

demonstrate improper questioning or arguments.[100] The government should respond "not simply on unsupported pleadings but on affidavits or other evidence tending to support a contrary finding."[101] A request pursuant to *Brady v. Maryland*[102] for favorable testimony given by grand jury witnesses might cause the prosecutor to produce transcripts of witnesses who testified favorably to the defendant while resisting an improper examination.[103]

Defendants may ask the court to examine the prosecutor's advice on the law when the statute charged as being violated is very complicated.[104] Defendants also should ask the court to determine if there was any prejudicial or misleading summarization of the transcripts of prior testimony[105] or the use of transcripts of prior testimony to hide witnesses with credibility problems.[106] Although the courts are reluctant to examine volumes of testimony based upon conclusory allegations, there is a definite trend for courts to examine grand jury testimony when some proof of impropriety can be demonstrated.[107]

## IX. CONCLUSION

The grand jury is a powerful and useful institution of government. The grand jury's continued viability depends upon the professional integrity of the prosecutor. He cannot abuse his close relationship with the grand jury. He must not mislead the grand jurors by the type of evidence that he presents or hide from them the infirmities of government witnesses. He must not avoid presenting key witnesses that the grand jury should see and hear because of economy of time. The prosecutor should conduct searching examinations and ask hard questions, yet must refrain from berating or badgering witnesses simply to discredit them in the eyes of the grand jury.

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[100] *Shane*, 584 F. Supp. at 367.

[101] *Id.*

[102] 373 U.S. 83 (1963).

[103] The evidence of the misconduct in United States v. Serubo, 604 F.2d 807 (3d Cir. 1979), was discovered in this fashion. *See id.* at 814.

[104] *See, e.g.*, United States v. Sun Myung Moon, 532 F. Supp. 1360 (S.D.N.Y. 1982), *aff'd*, 718 F.2d 1210 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 2344 (1984).

[105] *See supra* note 59.

[106] The court in United States v. Shane, 584 F. Supp. 364 (E.D. Pa. 1984), set forth a procedure for determining whether the use of summary transcripts was misleading. The court first must determine whether to review the summaries *in camera* or order the release of the summaries to the defendants. The decision to release the summaries to the defendant turns on the good faith of the prosecutor in using summaries. The court said:

> The prosecutor's burden is to demonstrate good faith in their use. This can be shown by the existence of a very lengthy record, portions of which are not relevant in the prosecutor's estimation to a finding of probable cause. It should be clear, however, that relevance alone as a justification cannot be sufficient to demonstrate good faith, for it leaves in the hands of the prosecutor an editorial decision of grave importance. Rather, relevance can be argued as one of several factors in a carefully thought-out decision not to transmit the full transcript to the grand jury. Further, that the prosecutor provided the grand jury with opportunities for hearing or viewing the entire record, or portions in their entirety, would show good faith.

*Shane*, 584 F. Supp. at 367 (quoting United States v. Mahoney, 495 F. Supp. 1270, 1276 (E.D. Pa. 1980)).

The court held that administrative convenience does not establish good faith and will warrant disclosure to the defendant. *Id.* at 367. Where the prosecutor can establish good faith the court need only conduct an *in camera* review. *Id.* at 368.

[107] *See supra* note 97.

The continued viability of the grand jury depends upon the professionalism of the prosecutors who appear before it.[108] If the courts are of the opinion that the prosecutors are carrying out their duties in a straightforward and fair manner, the courts will be reluctant to exercise their supervisory power to impede the work of the grand jury. When the courts strongly suspect that the prosecutors are abusing their positions to obtain an indictment at all costs by resorting to underhanded tactics, or are sloppy in their approach to grand jury practice, the courts will examine closely the activities of the prosecutor.

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[108] The Department of Justice currently has a nationwide training program for prosecutors with heavy emphasis on grand jury practice. This training should be continued and intensified on the grand jury portion. All newly hired assistant U.S. Attorneys and attorneys in the litigating sections of the Department of Justice in Washington D.C. should be required to undergo this grand jury training in the first three months of their service.

Senator **Armstrong**. I have one last general question, but if there is anything else you would like to put in the record or raise as a concern, I would be glad to hear it.

Mr. **Vaira**. No concerns, except I think that now is the time. This may be the right time to get those three proposals through that the ABA has suggested—this particular fact situation, the time we are in in the country, we might be able to do it. If we get any one through, we are doing OK. If we get the counsel for the grand jury in, we—and I say "we, the United States"—will have gone a long way to where we should be going.

Senator **Armstrong**. I have got that. And I have noticed the consistency of what you said with that of the other attorneys who have testified, so I am encouraged by that.

I want to ask one kind of general question: If you were me, if you were a person who really did not wish to get involved in trying to play cops and robbers or trying to write legislation which, really, in this case we are talking about legislation completely outside my field of day-to-day knowledge, and if you had just sort of a citizen's concern that, "Here we are; we have a fair amount of evidence of wrongdoing," not just in the *Kilpatrick* case or the *Omni* case but some others which we haven't talked about yet but which we intend to get to at some point in time, how would you pull all of this together?

Obviously you would favor the passage of the House bill that we have talked about. How would you go about restructuring the OPR? Is it enough to just say we ought to look at an inspector general concept? Is there legislation along that line written, or is that something that somebody has got to write at this stage of the game?

Has anything like that been written? I suppose that is not difficult to write, because you have the model.

Mr. **Vaira**. You have the model. There is the National Inspectors General Act, in which, oh, seven or eight major departments of the United States were given that particular office—HHS, Education, Defense, Labor, pretty powerful inspectors general—whose job, in addition to looking at other things, is the internal integrity of their particular agencies. The ones that were not made Presidential appointments were done so by regulation.

If you wanted to do that, the Department of Justice is such a big agency that I believe the inspector general of that very possibly might have to be a Presidential appointee, because the Department of Justice has the keys to the kingdom, they watch the HPN house, and you want the appearance, of impartiality. That person might have to be a Presidential appointee who has the same horsepower as his boss.

Senator **Armstrong**. Were you tuned in when we were talking about these people who have been convicted of the same offenses that are present in the *Kilpatrick* case, and I raised the issue of what will we do about them, what will we do about the guy in Grand Junction who has served time or the others who have been convicted and are awaiting an appeal? Is it reasonable to expect that the Department of Justice would go back and review those and perhaps under their own initiative do something about it?

Mr. **Vaira**. No. And I will tell you why.

Senator **Armstrong**. Is it reasonable for me to ask them to do so?

Mr. **Vaira**. Well, it is reasonable for you to ask them. But you have to get all of the facts, because I am not quite sure what the charges are.

Senator **Armstrong**. I am not, either. You see, that is the point; I don't want to know. That is something that they ought to do. It is their job. It is the Attorney General's job to see to the enforcement of justice. I am a policymaker, and my policy is that I want to see justice done in these cases.

Mr. **Vaira**. I am not accusing them of being slovenly or of completely ignoring this.

Senator **Armstrong**. Nor am I. I am just asking what is reasonable.

Mr. **Vaira**. There is a general rule in the law that five people can plead guilty in a case, and then the court can throw out the charges as to the sixth, and the others will stand, and the court won't go back and look at them again unless there was simply no jurisdiction at all.

Senator **Armstrong**. That is a general rule of law.

Mr. **Vaira**. That is a general rule. Now, if there was never an offense, as a matter of justice it should be looked at. But the Justice Department may be taking the position that maybe in *Kilpatrick*, even though the court threw it out, that that judge was wrong, and that does state an offense in some other jurisdiction. They may justifiably take that.

Now, that doesn't sound fair, but that happens all the time. And so, I think that it would be fair for you to ask the Department of Justice to take one hard look at that and say, "Look, are you serious about this, or are you just playing hardball and don't want to admit that the law isn't what you say it is?"

Senator **Armstrong**. What do you mean it happens all the time?

Mr. **Vaira**. It happens quite often in situations where you will have maybe five persons indicted in the same case, and four of them will plead guilty, decide that's it and waive all defects, and the fifth one will take it to trial and have it thrown out for any number of reasons—either be found not guilty, or it will be found that the way it was plead that indictment doesn't state an offense. Those other convictions still stand.

Senator **Armstrong**. That is the essence of the *Kilpatrick* case and the thing to me as a layman is persuasive, even more than the fact that there are these prosecutorial abuses and the fact that some Federal prosecutor acted like a jackass, or whatever it was.

The fact that the court found that the actions which *Kilpatrick* admitted he took simply didn't constitute a crime, that is a very persuasive issue to me. If there are others who have been charged with the same offense, it seems to me that somebody, for Heaven's sakes, ought to go back and look at their cases and try to make amends.

Mr. **Vaira**. I agree.

Senator **Armstrong**. At least get them out of jail.

Mr. **Vaira**. I agree, and they can do one of two things: They can do as you suggest and go back and say, "Yes, based upon what we saw, and based upon we now have precedent, and Judge Kane has said this is not an offense, let's go back and take a look, maybe just as a matter of justice." Or, they can say, "That is his opinion, and we have other places where other judges have said it is an offense."

I don't know that much about what occurred here, but I think you should ask that question.

Senator ARMSTRONG. At least pursue it?

Mr. VAIRA. Yes, sir.

Senator ARMSTRONG. If I may, I would like to submit questions for Mr. Vaira from Senator Grassley. And also, if Mr. Grossman is still here, I would like to submit some questions from my colleague Mr. Grassley. He has a number of questions, three or four, that he would like to ask you to comment on, and if we may we would like to furnish you a copy of these and ask you to respond in writing.

Mr. VAIRA. Of course. Yes, sir.

Senator ARMSTRONG. Is there anything else? [No response.]

If not, I certainly thank you all for helping us out with this; we are grateful to you. And chances are we may be back in touch to seek your advice further.

Many thanks. We are adjourned.

[Whereupon, at 4:05 p.m., the hearing was recessed, to reconvene at 10 a.m. on Monday, June 23, 1986.]

[Mr. Vaira's written testimony follows:]

[illegible]

STATEMENT

OF

[illegible]
[illegible]
[illegible]

ON BEHALF OF THE

AMERICAN BAR ASSOCIATION

BEFORE THE

SUBCOMMITTEE ON [illegible] OF THE [illegible]
COMMITTEE ON [illegible]

UNITED STATES SENATE

CONCERNING

[illegible]

[illegible]

Mr. Chairman and Members of the Subcommittee:

## Introduction

My name is Peter F. Vaira. I am Vice Chairperson of the American Bar Association Criminal Justice Section's Grand Jury Committee. I appear today on behalf of the Association at the request of its President, William W. Falsgraf.

I served as an attorney in the U.S. Department of Justice for 15 years. From 1978 through 1983, I was the United States Attorney for the Eastern District of Pennsylvania. I am now a partner in the Chicago law office of Lord, Bissell and Brook.

The American Bar Association strongly supports the grand jury. It is a fundamental institution in our system of justice. The protection of the grand jury is guaranteed by the Fifth Amendment.

In order to preserve and enhance the protective role of the grand jury, the American Bar Association has adopted a series of Grand Jury Principles. A copy of these Principles and their Commentary are appended to this statement. Much of my testimony is based on them.

## Scope of Statement

In presenting this statement, the American Bar Association does not suggest that the U.S. Department of Justice engages in wholesale grand jury abuse. These comments are presented as prophylactic suggestions. They detail how grand jury abuse arises in certain situations and may be prevented.

## Controlling Grand Jury Abuse

We have been requested to comment on the Department of Justice's ability to police its own attorneys' professional conduct. I can provide some personal insight into this question. While I was a United States Attorney, I had numerous dealings with the Department of Justice Office of Professional Responsibility. It has been my experience that the office has always exhibited the highest caliber of professionalism in its investigations. I have no doubt as to its ability to investigate any allegation of misconduct, including those relating to grand jury abuse.

Aside from the Department of Justice's internal oversight of government attorneys' conduct on grand jury matters, the role of federal prosecutors and federal agents assisting the prosecutor in a grand jury investigation is regulated by Rule 6(e) of the Federal Rules of Criminal Procedure. In addition, it is regulated by the supervisory power of the United States District Courts.

## The Role of the Prosecutor

The prosecutor is the legal advisor to the grand jury. This person decides what subjects the grand jury investigates.

who will be called as witnesses and what documents to subpoena. He questions witnesses. He advises the grand jury concerning the relevance of the evidence, drafts the charges to be brought, advises the grand jury on the relevant law, and requests the grand jury to return an indictment. The grand jury cannot return an indictment without the prosecutor's signature and consent.

## The Role of Investigating Agents

Grand Jury investigations are not conducted solely by subpoenaing witnesses and documents before the grand jury. This method of gathering information is inefficient and cumbersome. The majority of the information obtained during a grand jury investigation is obtained by federal investigative agents from federal agencies such as the Federal Bureau of Investigation, Internal Revenue Service, Department of Labor, Secret Service, the Bureau of Alcohol, Tobacco and Firearms, the Customs Service and Inspectors General of various federal agencies. The majority of the investigative work during an investigation is done by the special agents of these organizations. Working in conjunction with the prosecutor, these special agents obtain information, review documents, and gather data which the prosecutor then puts before the grand jury by means of witnesses.

Rule 6(a) of the Federal Rules of Criminal Procedure permits the information obtained by the grand jury to be shared with these federal agents so that they can better assist the prosecutor in the performance of the prosecutor's duty to enforce the federal criminal law. The agents who assist the prosecutor cannot use the information which is thus obtained from the grand jury for civil purposes. The ABA strongly supports this principle which prevents unauthorized disclosure of secret grand jury information for use in civil proceedings.

## The Problem

The problem of civil use of grand jury material generally arises when the investigative agency assisting the prosecutor has both civil and criminal jurisdiction, such as the IRS. As a control over this possible misuse of grand jury material, Rule 6(e) of the Federal Rules of Criminal Procedure requires that the prosecutor supply the court supervising the grand jury with names of the federal agents who have been given access to grand jury material. Herein lies a practical problem.

The special agent assisting the grand jury does not work alone. He must necessarily share investigative information with his counterparts and supervisors. In the case of the FBI, investigative information is often sent to FBI headquarters in Washington. Although it would be impractical for the prosecutor to list everyone who has access, the prosecutor can order the agent to whom disclosure has been made to keep track of all such disclosure so that a report can be given to the court whenever the court requests it. The agent is further instructed that the information is to be used only for the criminal investigation. This control usually is not a problem when the agencies involved have only criminal investigative jurisdiction.

The problem arises when the agency has vast civil powers such as the IRS. Here the control must be strict and the names of the persons receiving the information must be scrupulously maintained. This is especially important with the IRS because the primary role of the IRS is to collect taxes, not to conduct criminal investigations. Furthermore, the ultimate goal of any IRS investigation, criminal or civil, is to determine how much money is due and owing to the United States.

## Dual Role of Investigating Agents

The role of the special agent of the federal agency is to assist the prosecutor in a grand jury investigation in developing evidence concerning whether a crime has been committed. In doing so the special agent always acts in his capacity as a special agent of the federal agency by which he is employed. He does not act as an agent of the grand jury. A federal grand jury does not have an investigating agent.

It is true that often the prosecutor requests the federal agent to examine documents which have been subpoenaed for analysis. The documents are entrusted to his care pursuant to Rule 6(e). He then appears before the grand jury and testifies as to his findings.

In this role the special agent is still acting as a federal investigator assisting the prosecutor - not an agent of the grand jury. This role does not give the special agent any special status as a representative of the grand jury.

When a special agent interviews prospective grand jury witnesses, he does so as a special agent of his agency - not as an agent of the grand jury. He may report the result of his interview to the prosecutor who may decide to subpoena the witness, or may ask the agent to testify before the grand jury as to the result of the interview, depending upon its relevance and importance. However, the special agent never steps out of his role as a special agent - investigator - for his agency.

## Potential for Abuse by Investigating Agents

The problem discussed in the Kilpatrick and Anderson cases indicates that the prosecutor lost control of the agents and the agents believed their role was other than special agents of the IRS.

Special agents should not identify themselves as agents of the grand jury. This will mislead potential witnesses who may be served with a subpoena into thinking that they must agree to an interview with the agent or be subpoenaed to testify.

The decision to subpoena lies with the prosecutor - not the agent. This is in accordance with ABA Grand Jury Principle No. 12. The threatened use of a grand jury subpoena to force a person to submit to an interview by the special agent is improper. Either the person is to be subpoenaed or not.

The special agent when assisting the prosecutor in a grand jury investigation should continue his role as a special agent. He should be free to conduct interviews. If as a result of grand jury testimony, the prosecutor gives him new leads to pursue, he does so as a special agent of his agency, not as an agent of the grand jury.

In conducting these investigations the special agent must take care that he does not disclose information which was obtained by the grand jury. He cannot tell potential witnesses that a certain person is under grand jury investigation. He cannot identify targets of the grand jury. He cannot send out letters announcing a grand jury investigation such as was done in Kilpatrick.

## Potential for Abuse by Prosecutors

The prosecutor in his role as advisor to the grand jury must take care that he does not mislead the grand jury so that it departs from its impartial role. This is in keeping with Standard 3-1.1(c) of the ABA Standards for Criminal Justice which states, "The duty of the prosecutor is to seek justice, not merely to convict." The advisory committee which drafted the 1979 amendments to Rule 6(e) also recognized that the peculiar relationship between the prosecutor and the grand jury can result in "a dependency relationship - which can easily be turned into an instrument of influence on grand jury deliberations." Advisory Note, 1979 Amendment, Rule 6(e) F.R.Cr.P.

The prosecutor may ask hard questions, but must not question a witness simply to harass him purposely degrade him, especially if the prosecutor does not believe the witness is telling the truth. This conduct violates ABA Grand Jury Principle No. 11.

The prosecutor may present summaries of prior grand jury testimony or of interviews of witnesses. However, the grand jury must not be mislead by these summaries. In furtherance of this concept, ABA Grand Jury Principle No. 6 proposes that a prosecutor should not present evidence which he knows to be constitutionally inadmissible at trial.

If the witness is crucial to the grand jury presentation, he should be called even if he testified in a prior grand jury. This is especially so if the witness has himself been involved in criminal activity or is an accomplice, and the grand jury should judge his credibility. The American Bar Association's position supporting this is detailed in Grand Jury Principle No. 5. See also United States v. Hogan, 712 F.2d 757, 761 (2nd Cir. 1983); United States v. Provenzano, 440 F. Supp. 561 (S.D.N.Y. 1977); Vaira, "The Role of the Prosecutor Inside the Grand Jury Room," 75 Journal of Criminal Law and Criminology, 1129 (1984).

## Sanctions for Abuse

This Subcommittee has asked for a statement of the law on what showing courts require before dismissing an indictment for prosecutorial misconduct. The American Bar Association has not taken a position that delineates any specific sanctions when this question arises. However, Grand Jury Principle No. 25 states that the court, shall impose "appropriate sanctions" for violations of the points raised by the ABA's Grand Jury Principles. Many violations of the Principles could arise as a result of prosecutorial misconduct. A review of court decisions on prosecutorial misconduct may be helpful to the Subcommittee.

In regard to the grand jury setting, courts have defined two criteria for determining the effect of prosecutorial misconduct. Some courts have held that in order to dismiss an indictment the court must find an actual prejudice to the defendant. United States v. Adamo, 742 F.2d 927, 941 (6th Cir. 1984); United States v. McKenzie, 678 F.2d at 629, 631 (5th Cir. 1982). Other courts have applied the cumulative error rule, finding that the court's supervisory powers may be invoked without a showing of actual prejudice, where the prosecutor's unethical conduct has become a common practice within the district or the circuit. For example, the Third Circuit Court of Appeals said that "[federal] courts have an institutional interest, independent of their concern for the rights of the particulr defendant in preserving and protecting the appearance and the reality of fair practice before the grand jury, an interest which could justify the imposition of a prophylactic rule in a proper case." United States v. Serubo, 604 F.2d 807, 817(3d Cir. 1979). The cumulative error rule is invoked when: "The cumulative effect of the . . . errors and indiscretions, none of which alone might have been enough to tip the scales, operated to the defendants' prejudice by producing a biased grand jury." United States v. Samango, 607 F.2d 877. 884 (9th Cir. 1979). Under either standard, if the overall conduct of the prosecutor is sufficiently egregious, courts will find prejudice from the fact that the independence of the grand jury was destroyed. Id.

The events in the Kilpatrick and Anderson cases highlight the need for close supervision by the courts to prohibit prosecutorial misconduct. Although the vast majority of prosecutors are scrupulous and adhere to ethical and legal principles, the nature of the grand jury is such that much depends upon the personal integrity of the prosecutor alone. The only check on his activity is the supervisory role of the court.

## Preventing Grand Jury Abuse

There should be a continuity of supervision, such as having a single judge supervise all grand juries, as in the Northern District of Illinois, or one judge for the life of each grand jury. In the Eastern District of Pennsylvania one judge is assigned to each grand jury investigation and maintains supervision over that particular investigation for its entire course.

The secrecy provisions of Rule 6(e) make it difficult to raise questions of prosecutorial misconduct. Attorneys for witnesses and targets cannot easily determine whether the prosecutor has mislead the grand jurors, improperly advised them on the law, presented them with misleading summaries, or taken advantage of his close relationship with them.

The Court of Appeals for the Seventh Circuit has developed a practice that if an indicted defendant can demonstrate a probable grand jury abuse, the court will examine the grand jury transcript in camera. If the court determines there is evidence of misconduct, the court will give the prosecutor the choice of permitting the defendant's attorney to examine the transcript or having the indictment dismissed. See United States v. Edelson, 581 F.2d 1290, (7th Cir. 1978).

Although this practice is a positive step, the procedure remains difficult. Unless an attorney knows what has occurred before the grand jury, he cannot demonstrate the particularized need to obtain the grand jury transcripts. On the other hand, a wholesale disclosure of grand jury transcripts would weaken the overriding principle of grand jury secrecy, and may tarnish the reputation of innocent persons who were under investigation and reveal on-going investigations as to other persons.

There are two practical changes that can be suggested to protect this delicate balance:

1. Permit witnesses to be accompanied by counsel when appearing before the grand jury. Counsel may not address the grand jury, nor raise objections in the grand jury room. Counsel's role is merely an advisor to the client. Sixteen states have such a procedure and have found that the practice does not inhibit grand jury practice. The proposal has long been the position of the ABA (e.g. see Grand Jury Principle No. 1).

2. After indictment the defendant should be permitted to examine the grand jury transcript relating to the prosecutor's collogues with the grand jury and his questioning of witnesses related to the indictment returned. This will not permit an examination of whether there was sufficient evidence to indict, but permit an examination for grand jury abuse. If the government objects as to certain portions because of special circumstances such as, the material will disclose other investigation, the burden should be on the government to show with particularized need that the transcripts should not be disclosed.

This latter suggestion is mine. It is not the position of the ABA.

## Conclusion

It is hoped this statement contains information that is of use to the Subcommittee and has assisted the members in understanding some of the complex issues related to federal grand jury procedures and potential abuse. I will be pleased to answer any questions.

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# ABA Grand Jury Principles

*Developed by the American Bar Association*
*Section of Criminal Justice*

NOTE: Only the grand jury principles constitute approved ABA policy. The commentary and backup report are included for explanatory purposes.

The American Bar Association supports grand jury reform legislation which adheres to the following principles:

1. Expanding on the already-established ABA policy, a witness before the grand jury shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in the proceedings before the grand jury. The court shall have the power to remove such counsel from the grand jury room for conduct inconsistent with this principle.

2. Every witness before a grand jury shall be informed of his privilege against self-incrimination and right to counsel and shall be advised that false answers may result in his being charged with perjury. Target witnesses shall be told that they are possible indictees.

3. No prosecutor shall knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt.

4. A prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law.

5. A target of a grand jury investigation shall be given the right to testify before the grand jury, provided he/she signs a waiver of immunity. Prosecutors shall notify such targets of their opportunity to testify unless notification may result in flight or endanger other persons or obstruct justice; or the prosecutor is unable with reasonable diligence to notify said persons.

6. The prosecutor shall not present to the grand jury evidence which he or she knows to be constitutionally inadmissible at trial.

7. The grand jury shall not name a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars.

8. A grand jury should not issue any report which singles out persons to impugn their motives, hold them up to scorn or criticism or speaks of their qualifications or moral fitness to hold office or position. No grand jury report shall be accepted for filing and publication until the presiding judge submits *in camera* a copy thereof to all persons named or identifiable and such persons are given the opportunity to move to expunge any objectionable portion of said report and have a final judicial determination prior to the report's being published or made public. Such motion to expunge shall be made within ten days of receipt of notice of such report. Hearings on such motions shall be held *in camera*.

9. The grand jury should not be used by the prosecutor in order to obtain tangible, documentary or testimonial evidence to assist the prosecutor in preparation for trial of a defendant who has already been charged by indictment or information. However, the grand jury should not be restricted in investigating other potential offenses of the same or other defendants.

10. The grand jury should not be used by the prosecutor for the purpose of aiding or assisting in any administrative inquiry.

11. Witnesses who have been summoned to appear before a grand jury to testify or to produce tangible or documentary evidence should not be subjected to unreasonable delay before appearing or unnecessarily repeated appearances or harassment.

12. It shall not be necessary for the prosecutor to obtain approval of the grand jury for a grand jury subpoena.

13. A grand jury subpoena should indicate the statute or general subject area that is the concern of the grand jury inquiry. The return of an indictment in a subject area not disclosed by the grand jury subpoena shall not be basis for dismissal.

14. A subpoena should be returnable only when the grand jury is sitting.

15. All matters before a grand jury, including the charge by the impaneling judge, if any; any comments or charges by any jurist to the grand jury at any time; any and all comments to the grand jury by the prosecutor; and the questioning of and testimony by any witness, shall be recorded either stenographically or electronically. However, the deliberations of the grand jury shall not be recorded.

16. The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

17. Expanding on the already-established ABA position favoring transactional immunity, immunity should be granted only when the testimony sought is in the public interest; there is no other reasonable way to elicit such testimony; and the witness has refused to testify or indicated an intent to invoke the privilege against self-incrimination.

18. Immunity shall be granted on prosecution motion in camera by the trial court which convened the grand jury, under standards expressed in principle #17.

19. The granting of immunity in grand jury proceedings should not be a matter of public record prior to the issuance of an indictment or testimony in any cause.

20. A lawyer or lawyers who are associated in practice should not continue multiple representation of clients in a grand jury proceeding if the exercise of the lawyer's independent professional judgement on behalf of one of the clients will be or is likely to be adversely affected by his or her representation of another client. If the court determines that this principle is violated, it may order separate representation of witnesses, giving appropriate weight to an individual's right to counsel of his or her own choosing.

21. The confidential nature of the grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny.

22. It is the duty of the court which impanels a grand jury fully to charge the jurors by means of a written charge completely explaining their duties and limitations.

23. All stages of the grand jury proceedings should be conducted with proper consideration for the preservation of press freedom, attorney-client relationships, and comparable values.

24. The period of confinement for a witness who refuses to testify before a grand jury and is found in contempt should not exceed one year.

25. The court shall impose appropriate sanctions whenever any of the foregoing principles have been violated.

26. No prosecutor shall call before the grand jury any witness who has stated personally or through his attorney that he intends to invoke the constitutional privilege against self-incrimination. However, the prosecutor may seek a grant of immunity or contest the right of the witness to assert the privilege against self-incrimination. In any such case, the prosecutor shall file under seal any motion to compel the testimony of a witness who has indicated his refusal to testify in reliance upon his privilege against self-incrimination and any witness may file under seal any motion relating to or seeking to exercise or protect his right to refuse to testify. All proceedings held on such motions filed under seal shall be conducted in camera, unless the witness requests a public hearing.

27. The grand jury shall be informed as to the elements of the crimes considered by it.

28. No witness shall be found in contempt for refusal to testify before a grand jury unless (1) the witness is provided an opportunity to explain to the grand jury his refusal to testify; and (2) the grand jury thereafter recommends to the court that the witness be found in contempt.

29. No attorney, his agent or employee, shall be questioned by the grand jury concerning matters he has learned in the legitimate investigation, preparation or representation of his client's cause or be subpoenaed to produce before the grand jury private notes, memoranda, and the like constituting his professional work product.

30. The grand jury should be provided separate voting forms for each defendant in a proposed indictment, and each count in an indictment should be the subject of a separate vote.

**Supplement: Proposed Amendment to Rule 6(e), F.R.Cr.P.** The ABA also recommends amendment of Rule 6(e)(3)(A)(i) of the Federal Rules of Criminal Procedure (regarding disclosure of grand jury proceedings) to prevent unauthorized disclosure of secret grand jury information for use in civil proceedings, as follows (addition underlined):

(i) an attorney for the government for use in the performance of such attorney's duty to enforce federal criminal law;

# Commentary to Principles

Following are comments on each of the thirty principles and supplementary proposed amendment to Rule 6(e) of the F.R. Cr.P.

1. The American Bar Association has previously gone on record (in August 1975) supporting the right of a witness to have counsel present in the grand jury room. Principle #1 represents a reaffirmation of that position. Principle #1 spells out specifically what role counsel should play in the grand jury room. That role is carefully defined in the principle to make it clear that it is *strictly* limited to advising the witness. This limited role will preclude the grand jury's becoming a "mini-trial" — as some have feared — and will not impair expeditious investigations. Under the principle, counsel is not allowed to address the grand jurors or in any other way take part in the proceedings. Further, a provision is included to allow removal of counsel who are disruptive or do not otherwise stay within the prescribed boundaries laid down by the principle. Clarification of the attorney's limited role, coupled with the mechanism for removing disruptive counsel, should meet the objections raised by those who have feared creation of a "mini-trial."

Almost nowhere else in the criminal justice process — except before the grand jury — is a person who desires a lawyer denied that right. Requiring a witness who needs advice of counsel to consult his attorney outside the grand jury room door is awkward and prejudicial. It unnecessarily prolongs the grand jury proceedings and places the witness in an unfavorable light before the grand jurors. The American Law Institute has called it a "degrading and irrational" procedure. It is extremely damaging to the witness continually to get up, go outside, and consult with counsel.

A Seventh Circuit decision [*U.S. v. Kopel*, 552 F.2d 1265 (1977)] points to additional problems with the procedure of consulting counsel outside the grand jury room. In that case, the Seventh Circuit said the U.S. Attorney, who had granted the witness permission to leave the grand jury room, was free at trial to bring up this fact as relevant to the perjury charges against the defendant. Dissenting, Judge Swygert decried the fact that the government was "permitted to 'sandbag' him [the defendant] by using the fact that he consulted his attorney against him." Nor is the right to leave the grand jury room to consult counsel absolute. [*See In re Tierney*, 465 F.2d 806 (5th Cir. 1972), in which the court said a limit could be placed on how frequently the witness could leave the room to consult his lawyer.] The prestigious American Law Institute (ALI), in its Model Code of Pre-Arraignment Procedure adopted in 1975, supports counsel in the grand jury room. "While this is a break with tradition and prevailing practice," the ALI notes, "it is consistent with the provisions of some recent state procedure codes. . .It seems *unfair and inefficient* to require a witness to leave the grand jury room each time he wishes to consult with counsel." [at 237; emphasis added] The ALI commentary goes on to state that "exclusion of counsel. . .is closely related to the traditional view that the proceedings should be secret, and concern lest the presence of counsel hamper the freedom of the grand jury and the prosecutor in their investigation. . .The difficulty with this view. . .is that complex and important legal issues face a witness before a grand jury. An appearance before that body may subject an individual to the grave danger of self-incrimination or imprisonment for contempt. . .The witness may also inadvertently lose his right to claim the privilege by operation of the doctrine of waiver . . .And the inherent pressure and accompanying nervousness of a grand jury appearance upon an individual may make it very difficult for him to remember his attorney's instructions. . .For effective implementation of this right, an attorney should be present to follow the flow of the interrogation." [at 601]

Some 15 states now have statutes allowing counsel to be present in the grand jury room — Arizona (for target witnesses), Illinois (for target witnesses), Kansas, Colorado, Massachusetts, Michigan (one-man grand juries), Minnesota, New Mexico, New York, Oklahoma, Pennsylvania, South Dakota, Virginia, Wisconsin and Washington State. The Section contacted practicing attorneys and prosecutors in these states; none reported problems. In fact, some prosecutors who said they initially fought the procedure now support it as a means of insuring fairness in the system.

Several arguments are raised by opponents. First it is argued that allowing counsel in the grand jury room will be a breach of the secrecy rule. In fact, grand jury secrecy is not served by keeping the lawyer outside the grand jury room, since the witness is *free* to tell his attorney anything that occurred inside. [Federal Rule of Criminal Procedure 6(e)]. Second, it is argued that the presence of the witness' lawyer will restrict free testimony in cases of organized crime, corporate and political corruption investigations. In fact, the states which allow counsel in the grand jury room have retained the grand jury in most instances as an investigatory body for precisely these kinds of investigations, and have no record of negative results. Further, there are alternate ways of securing a cooperative witness' statement, and this evidence can be summarized for the grand jury in the form of hearsay [*Costello v. United States*, 350 U.S. 359 (1856)]. When a witness is called to testify before a grand jury, the witness' attorney, sitting outside the grand jury room, can easily conclude from the time spent with the jury whether the witness takes the Fifth Amendment or testifies in full. Experienced prosecutors, further, have noted that very few witnesses indicate a desire to cooperate without the knowledge of their counsel; if the witness' testimony is helpful to the government, that fact will become evident to the attorney fairly quickly.

Recognizing that problems arising from multiple representation of witnesses could be exacerbated by allowing counsel in the grand jury room, the Criminal Justice Section has strengthened principle #20, which addresses that subject.

The presence of the attorney will not only reduce unfair speculation about the prosecutor's conduct, but will also serve to inhibit the prosecutor from possible improper conduct. Analogous to having counsel present to witness a line-up, the presence of the attorney in the grand jury room will help to insure the fairness of the proceedings.

Former Watergate Special Prosecutor Charles Ruff — in supporting this proposal in congressional testimony — declared that ". . .the mere possibility of occasional disruption simply cannot overcome the right of the individual witness to consult his attorney without going through the mildly absurd process of leaving the grand jury room every time. Indeed, most prosecutors would admit, I think, that they count on the burden of leaving the room to dissuade the witness from asserting his right to counsel." [Testimony before House Judiciary Subcommittee, April 27, 1977, at 3.]

The American Bar Association has been a leader in asserting the right to assistance of counsel in the criminal justice process. As the *ABA Standards for Criminal Justice on Providing Defense Services* [§5-1.1] declare, "The objective in providing counsel should be to assure that quality legal representation is afforded . . ." Principle #1 would more meaningfully effectuate the Sixth Amendment right to assistance of counsel; but the limitations on the role of counsel will forestall the grand jury's being turned into an adversary proceeding. This proposal was approved by the ABA House of Delegates by an overwhelming 186-93 margin.

2. Principle #2 was added by the ABA House of Delegates at the August, 1977 Annual Meeting in Chicago as a proposed amendment to the Criminal Justice Section principles offered by the ABA Judicial Administration Division. During the 1977 debate, the U.S. Department of Justice representatives said that they did not oppose this principle.

3. Principle #3 states that the prosecutor shall not knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt. The ABA believes this to be a key element in bringing fairness to the grand jury process, and essential to prevent indictment of innocent persons. The Association already had gone on record in the *ABA Standards for Criminal Justice on the Prosecution Function* [§3-3.6(b)] supporting this, declaring that, "No prosecutor should knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt." The National District Attorneys Association (NDAA) Prosecution Standard 14.2D is also similar to principle #3. As the commentary to the ABA standard states, "Such a procedure enhances public confidence in the ultimate decision on whether to prosecute. The obligation to present evidence that tends substantially to negate the guilt of the accused flows from the basic duty of the prosecutor to seek justice." The NDAA standards note that such a standard "provides for a greater accuracy in the indictment determination by providing that the grand jury be allowed to consider — as the trial fact finder would — any facts tending to negate the defendant's guilt."

Indictments have been overturned on the grounds of due process when a court has ascertained that the prosecutor *knowingly* used perjured evidence or failed to present evidence that squarely negated guilt. [*U.S. v. Basurto*, 497 F.2d 781 (9th Cir., 1974); *Johnson v. Superior Court of California*, 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P.2d 792 (1975).] At the suggestion of U.S. Department of Justice representatives, who questioned the mechanics of the principle as first drafted, the Criminal Justice Section rewrote it to clarify its coverage and intent, since this is a legislative principle, and not simply a general standard for prosecutorial conduct. The Justice Department did not oppose this principle in the 1977 House of Delegates debate.

4. The fourth principle would require the prosecutor to recommend that the grand jury not indict if he believes the evidence presented does not warrant an indictment under governing law. This language is *identical* to that of §3.6(c) in the *ABA Standards for Criminal Justice on the Prosecution Function*, and the National District Attorneys Association Standard 14.2E. The NDAA standards commentary notes that this standard "recognizes the prosecutor's right and duty as legal advisor to the grand jury to recommend action to the grand jury. The prosecutor has a great deal more experience than the grand jurors in the strength and likely credibility of the evidence before a trial court. Since it will be his office's duty to prosecute the case, the prosecutor has a direct interest in assuring that resources are not squandered on unwinnable or otherwise improper cases." The ABA agrees with this rationale. Implementation of this principle will help to insure substantial justice within the grend jury room. The U.S. Department of Justice in 1977 indicated support for this principle.

5. Principle #5 would require that the target of a grand jury investigation be given the right to testify and present his side of the facts before an indictment is returned — provided such person signs a waiver of immunity. Under this proposal, the prosecutor would be required to take all reasonable steps to notify such prospective defendants — but recognizes that in some instances the prosecutor will truly be unable to locate such persons; or that, under some circumstances, notification may result in the person's fleeing, or his endangering witnesses or other persons, or obstructing justice. In such instances, notification would not be required.

The Criminal Justice Section made two changes in this principle during the drafting process. First, at the suggestion of the Justice Department, the term "subject" was replaced by "target." The Department suggested this as more appropriate wording, since "target" is the term generally used in federal law enforcement. Second, Justice Department representatives suggested addition of the phrase "or obstruct justice" as an additional condition under which the prosecutor need not notify a target. The Section also made this amendment, believing it to be inherent in the original principle. Principle #5 is intended to insure that fair and just opportunity is given individuals to testify in their own behalf prior to being indicted. Such groups as the Association of the Bar of the City of New York have supported such a right. This is an essential ingredient, the ABA believes, in a fairly functioning grand jury — and criminal justice — system. Without it, the grand jury's essential function of arriving at an accurate indictment is undermined. The Justice Department did not oppose this principle in the 1977 House of Delegates debate.

6. The sixth principle puts the affirmative burden on the prosecutor not to present evidence which he *knows* to be constitutionally inadmissible at trial. This was rewritten by the Criminal Justice Section during the drafting phase to meet Department of Justice concerns

about the principle as originally phrased. (It had originally stated that the grand jury "shall not consider unconstitutionally obtained evidence.") The ABA believes that the integrity of the grand jury will best be served by prohibiting presentation of unconstitutionally-obtained evidence by the prosecutor. Association policy in the *ABA Standards for Criminal Justice on the Prosecution Function* [§3-3.6(a)] declares that "a prosecutor should present to the grand jury only evidence which the prosecutor believes would be admissible at trial." Notwithstanding the U.S. Supreme Court's decision in *U.S. v. Calandra*, 414 U.S. 338 (1974), the ABA believes that this principle is needed to insure the integrity of the grand jury process; indeed, the Court in *Calandra* noted that "for the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained" because of use of illegally-seized evidence. The principle is thus not inconsistent with the thrust of *Calandra*.

7. Principle #7 would prohibit naming a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. The ABA believes that naming of persons as unindicted co-conspirators visits opprobrium upon them — by charging the named persons with the commission of a crime but denying them a forum in which to see acquittal or vindication. This stains the reputation of the person without providing any means for the person to show his innocence. This is an instance in which reforms are needed to insure the fair functioning of the grand jury.

The United States Court of Appeals for the Fifth Circuit has already held in accordance with this principle in *U.S. v. Briggs*, 514 F.2d 794 (1975). A second sentence states that supplying such names in a bill of particulars would not be prohibited. This would permit the prosecutor to respond to a request by the defense to reveal the names of co-conspirators who were not indicted. The Justice Department in 1977 did not oppose this principle.

8. The issuance and publication of grand jury reports which single out persons for scorn or criticism, impugn their motives, or denigrate their moral fitness to hold office have the effect of charging such persons with misconduct or unfitness — without affording them any forum in which to refute the charges or to seek vindication. The proper purpose of grand jury reports is to inform the public of situations requiring administrative, judicial or legislative corrective action — not the castigation of individuals when the fact-finding forum insured by the finding of an indictment is absent. The ABA is not proposing that such grand jury reports be proscribed from commenting on the job that an office holder is performing; but such reports should not condemn character alone. Grand jury reports which do single out persons in the manner described tend to undercut the fairness of the grand jury. Such misuse of the grand jury can, in fact, affect the political process. Judicial scrutiny of the report is essential to prevent spurious attacks on individuals when no forum of trial is available. The states that have recently considered this issue have reinforced control over the reporting process. [*People v. Superior Court of Santa Barbara County*, 531 P.2d 761 (Cal. 1975); Del. Rules, R.6 (1975); FLA. STAT. ANN. §905.28 (1975).]

The procedures proposed in principle #8 will assist in insuring that such abuses do not occur. [*See U.S. v. Briggs*, 514 F.2d 794 (5th Cir. 1975) and *Report of Grand Jury Proceedings*, 479 F.2d 458 (5th Cir. 1973).] The National District Attorneys Association Prosecution Standards commentary (discussing an NDAA proposed standard on this subject, modeled on recent New York legislation) notes that "...an unfavorable report may stand as a severe form of extra-judicial punishment, from which there is no appeal...the quasi-judicial nature of the grand jury gives it an apparent reliability which may not be justified...grand jurors are accountable to no one...grand jurors may impose a personal standard of morality on persons, rather than an abstract and neutral conception of right and wrong." This proposal was not opposed by the Justice Department during the 1977 debate.

9. The ABA opposes the practice of a prosecutor's using the grand jury to obtain tangible, documentary or testimonial evidence to assist in his preparation for trial of a defendant *already* charged by indictment or information. This is an abuse of the grand jury, and transforms it into a mere tool and arm of the prosecutor's office — a role which is contrary to the grand jury's historical purpose and function. The Department of Justice supports this principle. In a Department Office of Policy and Planning statement filed in 1976 with the House Judiciary Subcommittee examining grand jury legislation, the Department stated that, "It is well-established under federal case law that a grand jury should act only with a view toward returning an indictment or to satisfy itself that no crime has occurred...It would be an abuse of legal process for a government attorney to use a grand jury to discover or build up evidence for trial of an existing indictment. Courts would discipline attorneys who did so and the Department would not countenance such action by its representatives."

This principle is in accord with well-settled case law. [*United States v. Dardi*, 330 F.2d 316 (2d Cir. 1964); *United States v. Doss*, 545 F.2d 548 (6th Cir. 1976).] In the *Doss* decision, the court declared that, "We find no constitutional statutory or case authority for employment of the grand jury as a discovery instrument to help the government prepare evidence to convict an already-indicted defendant. Such a use of the grand jury would pervert its constitutional and historical function..." The court called it "a possible revival of a version of the Star Chamber of 16th Century England..."

10. The ABA strongly opposes prosecutorial use of the grand jury to assist in administrative investigations — e.g., Internal Revenue income tax investigations. Such improper utilization of the grand jury warps its true function and leads to abuses such as those described in #9, *supra*. The ABA House of Delegates in February 1977 — in addressing a proposed amendment to Federal Rule of Criminal Procedure 6(e) — expressed concern regarding dissemination of grand jury information to government experts for use in unrelated civil proceedings. The Criminal Justice Section report accompanying the House-approved resolution declared that disclosure of grand jury information to a broad group of governmental personnel might be used as "subterfuge by some agencies to obtain information through the grand jury process which was not legitimately required for the purposes of the pending grand jury investigation....The dissemination of information to serve particularized departmental or agency needs would not be a legitimate one." [House of Delegates Report Book, 2/77 Midyear Meeting, at 138-9.]

A U.S. Department of Justice paper submitted to the House congressional hearings echoes this concern: "One of the primary abuses of the grand jury which must be avoided...is the attempted use of its broad investigative powers by governmental agencies in pursuit of investigations that are solely their own rather than the grand jury's." [U.S. Department of Justice Office of Policy and Planning, *Memorandum on the Grand Jury*, p.106; printed in record of House Judiciary Subcommittee Hearings.] In the case of *United States v. Doe*, 72 Crim. Misc. 1(S.D. N.Y. 1972), the court, in denying a government motion to examine special grand jury minutes to determine violations of Titles 18 and 28 *and* "to determine civil tax liability," declared that, "The grand jury's role is properly confined . . . when it is held empowered to conduct investigations that are in their inception exclusively criminal." It should be noted that the Attorney General's Advisory Committee of U.S. Attorneys in 1977 expressed its support for this proposed principle.

11. Principle #11 provides that witnesses summoned before grand juries should not be subjected to unreasonable delays or unnecessarily repeated appearances or harassment. The ABA supports legislation which would forbid such practices. In some instances, these abuses have occurred and grand jury witnesses have been repeatedly called to appear, or have been subjected to unreasonable delays or other forms of harassment. An indifference to the convenience of a grand jury witness is as objectionable as the use of a grand jury subpoena to harass a witness, and is a subtle means of intimidating the witness before his appearance. The *ABA Standards for Criminal Justice on the Prosecution Function* [§3-5.7(a)] recognize the prosecutor's obligation to handle witnesses "fairly, objectively, and . . . without seeking to intimidate or humiliate the witness . . ." The U.S. Department of Justice in 1977 supported this principle, as did the Advisory Committee of U.S. Attorneys.

12. Several grand jury reform bills over recent Congresses would require grand jury approval of any subpoenas issued. The ABA opposes such a procedure. It believes this requirement would not only be cumbersome, but would cause unnecessary delay. The prosecutor, the ABA believes, is much better suited to make determinations regarding issuance of subpoenas than are lay grand jurors. The ABA thus does not support these provisions in pending legislation. The Advisory Committee of U.S. Attorneys in 1977 supported this principle.

13. Principle #13 would require that a grand jury subpoena indicate the statute or general subject that is the focus of the grand jury inquiry. This requirement is intended to enable the recipient and the court to determine more accurately questions of relevancy. It would also enable the witness to prepare himself more adequately for his appearance, and would insure more effective and efficient use of counsel, court and grand jury time. The principle does *not* intend that a detailed description of the statutory *and* subject areas be required; but that a broad statutory citation or general description of the subject be included. Justice Department representatives in 1977 expressed support for this principle, but indicated concern that, as initially written, the principle would leave open the question of later challenges to the indictment based on the fact that the defendant was charged under statutes not named in the subpoena. To meet this concern and clarify the principle's original intent, the Criminal Justice Section added the second sentence; this makes it clear that the indictment cannot be vitiated if the person is indicted under a statute or in a subject area not mentioned in the subpoena. The Advisory Committee of U.S. Attorneys in 1977 supported this principle.

14. A grand jury subpoena should not be returnable except when the grand jury is sitting. This proposal is intended to avoid potential abuse of the subpoena power by the prosecutor's office. It will help to insure the integrity of the grand jury function. Both the Justice Department and the Attorney General's Advisory Committee of U.S. Attorneys in 1977 supported this principle.

15. Principle #15 would mandate stenographic or electronic recording of all matters before the grand jury — except the deliberations of the grand jury itself. This would represent a logical step forward in grand jury reform, and is not inconsistent with the necessity of maintaining grand jury secrecy. The judge's charge to the grand jury would be recorded, as would the prosecutor's introductory remarks and testimony and questioning of all witnesses. Some 31 states already require recording of all grand jury proceedings other than votes and deliberations, and an additional 6 states permit it, according to a Library of Congress study (printed in 1976 Hearings Record, House Judiciary Subcommittee on Immigration, Citizenship and International Law, at 714).

Since this proposal was adopted by the ABA in 1977, the Federal Rules of Criminal Procedure have been amended to require recordings of all grand jury proceedings. This is a major step forward.

Major groups have supported this requirement. The American Law Institute, in its Model Code of Pre-Arraignment Procedure, urges that a record be made of all proceedings before the grand jury. The *ABA Standards for Criminal Justice on the Prosecution Function* [§3-3.5(c)] — already ABA policy — provide that, "The prosecutor's communications and presentations to the grand jury should be on the record." The accompanying commentary points out that "since grand jury proceedings are generally secret and *ex parte*, it is particularly desirable that a record be made of the prosecutor's communications and representations to the jury." The Prosecution Standards of the National District Attorneys Association [§14.2(F)] also urge that "all testimony before the grand jury should be recorded." Recording will aid the prosecution — by insuring that perjured testimony does not go unpunished. Recording would also act as a restraint on the prosecutor not to exercise undue or improper influence on the grand jury.

16. This principle is identical to The Prosecution Standards of the National District Attorneys Association [§14.4B] and the *ABA Standards for Criminal Justice on the Prosecution Function* [§3-3.5(b)]. It would prohibit the prosecutor from making statements or arguments to influence the grand jury action in a manner which would not be permitted before the trial jury. This is essential because of the prosecutor's role as the only legally-trained person before the lay grand jurors. As the commentary to the ABA standards notes, "A prosecutor should not take advantage of his role as the *ex parte* representative of the state before the grand jury to unduly or unfairly influence it in voting upon charges brought before it. In general, he should be guided by the standards governing and defining the proper presentation of the state's case in an adversary trial before a petit jury."

Because of the secret nature of the grand jury proceedings, the lack of direct court supervision, and the fact that the prosecutor's is a unilateral presentation, he must avoid unduly influencing the grand jurors by means which would not be appropriate in the public courtroom before a petit jury. This is essential to prevent the grand jury's becoming a mere echo of the prosecution. As one writer has noted, "[G]rand jurors must place enormous trust in the prosecutor's guidance. It is he, after all, who tells them what the charge is, who selects the facts for them to hear, *who shapes the tone and feel of the entire case*. . ." [emphasis added] [Antell, *The Modern Grand Jury: Benighted Super-government*, 51 A.B.A.J. 153, 154 (1965).] The Justice Department in 1977 expressed its support for this principle.

17. Principle #17 broadens a prior ABA policy concerning transactional immunity to specify proper instances in which immunity should be issued: when it is in the public interest; when there is no other reasonable way to elicit the testimony; and when the witness has refused to testify, or stated he will invoke the Fifth Amendment. This is intended to insure that grants of immunity are carefully considered prior to issuance and that they are not issued when other means could be used to obtain the needed information.

The ABA House of Delegates (at the 1975 Annual Meeting) had already supported amendment of 18 U.S.C. 6002 to provide "transactional" immunity, rather than "use" immunity provided under present federal law. Under transactional immunity, a witness may be statutorily compelled to give testimony which might otherwise violate the privilege concerning self-incrimination, provided the witness is given immunity from prosecution for any crime referred to in the testimony. Under 18 U.S.C. 1525(b), Part V of the Organized Crime Control Act of 1970, and under *Kastigar v. U.S.*, 406 U.S. 441 (1972), only "use" immunity need be afforded. This merely prevents the prosecution from using the actual testimony (or leads derived therefrom) in any subsequent criminal prosecution.

Some 31 states currently provide transactional immunity. The National Conference of Commissioners on Uniform State Laws has supported it, in the Uniform Rules of Criminal Procedure (Rule 732[b]). "Use" immunity, while constitutional [*see Kastigar, supra*], should be rejected for several practical reasons. It is not only susceptible of prosecutorial abuse, but can be a subtle invitation to perjury on the part of the witness. Since the witness knows what he says can be used to impeach him, it can be an encouragement to slant his testimony in a manner most favorable to him. Testimony thus obtained is not accurate. [The reader's attention is called to the Third Circuit case of *United States v. Frumento*, 552 F.2d 534 (1977), which held that immunized testimony *cannot* be used to impeach a witness.] Witness cooperation is essential to an effective grand jury investigation, yet the uncertainty generated by "use" immunity, and the difficulties in determining the scope of the protection afforded the witness, can chill and inhibit his cooperation. Transactional immunity better encourages accurate testimony and minimizes witness resistance to questioning.

The small number of actual successful prosecutions of immunized witnesses with "use" immunity indicates that a return to transactional immunity will not remove a significant weapon against organized crime. [*See* 14 Am. Crim. L. Rev. 275, 282 (1977), wherein the U.S. Department of Justice reports that, in practice, few witnesses granted "use" immunity are subsequently prosecuted for crimes described in their immunized testimony.] "Use" immunity represents the most grudging interpretation of the constitutional right against self-incrimination, the ABA believes.

18. A number of recent grand jury reform bills have included a provision requiring approval of immunity grants by a majority vote of the grand jury. While many supporters of this provision believe that it would help to insure the independence of that body, the ABA does not support such a requirement. Instead, principle #18 would provide that immunity be granted on prosecution motion *in camera* by the trial court which convened the grand jury; the standards outlined in principle #17 would be followed in determining whether such a grant should be made. Lay grand jurors are not adequately oriented to make determinations regarding immunity grants, the ABA believes. This is properly an executive function with court overview.

19. Principle #19 would forbid making the granting of immunity in grand jury proceedings a matter of public record before the issuance of an indictment or testimony in any cause. To make public such grants undercuts the function of the grand jury by selectively publicizing its investigations — and has the definite potential of harm to those to whom immunity is alleged to have been granted. The U.S. Department of Justice in 1977 indicated its agreement with this principle.

20. The question of multiple representation of witnesses in grand jury proceedings has in recent years received increasing attention both from members of the private bar and from government attorneys. [See, e.g., Cole, *Time for a Change: Multiple Representation Should be Stopped*, 2 Nat'l. J. Crim. Def. 149 (1976); and Speech, May 3, 1977, to Chicago Bar Association on *The Perils of Multiple Representation in Criminal Antitrust Proceedings*, by Richard Favretto, Deputy Director of Operations, Antitrust Division, U.S. Department of Justice.] Recent court opinions have also tried to grapple with this question. [*See, e.g., In Re Investigation Before April, 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976).] Principle #20 was substantially rewritten by the Criminal Justice Section during the drafting stages to strengthen its provisions, to meet concerns raised by critics of the proposal to allow counsel in the grand jury room. Opponents of that principle have focused much of their objection on problems which could arise when one attorney represents more than one witness in a grand jury proceeding.

Principle #20 spells out the professional responsibility of an attorney *not* to continue multiple representation of clients in a grand jury proceeding if conflicts can arise. As originally worded, the principle provided that, "If the court determines that there is multiple representation of witnesses in a grand jury proceeding, it shall advise the witnesses that they have the right to to be separately represented by counsel, and explain that conflicts of interest may otherwise arise." Under the redrafted approved principle, the burden is initially placed on the defense attorney to assume responsibility for remedying situations when conflicts from multiple representation arise or are likely to arise. If the court finds that this principle is not being followed, however, it would have the authority to order separate representation. The phrase "giving appropriate weight to an individual's right to counsel of his or her own choosing" was added to avoid a situation in which the court summarily excludes certain counsel from representing *any* witness in the proceeding. Multiple representation is considered to include the following: two or more witnesses in a grand jury proceeding who may have conflicting interests; a witness and a potential defendant in a grand jury proceeding; or a witness whose counsel fees are paid by a third party who is a witness or potential defendant in a grand jury proceeding.

The significant ethical concerns involved in multiple representation when the clients have actual or potential conflicting interests; the potential compromises to the constitutional guarantee to effective assistance of counsel; and the potential for inhibiting the public's right to an effective grand jury investigation require the private bar to deal seriously with this issue. As Alan Y. Cole noted in the above-cited article, "To avoid the Scylla of conflict, the defense attorney with multiple clients will likely become engulfed in the Charydis of ineffective assistance of counsel . . ." The Justice Department in 1977 expressed its support for this principle.

21. Principle #21 provides that the confidential nature of grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny. Shielding their identity is necessary to prevent unjust harm to witnesses and potential defendants. The practice in some jurisdictions of having witnesses exposed to public and press as they emerge from the grand jury room is an unfair one — it taints the witnesses' reputations by the mere fact of their appearance. The importance of maintaining the secrecy of grand jury proceedings had already been recognized by the Association, when, in its 1975 policy, it urged strengthened penalties for unauthorized disclosure of grand jury information. The Justice Department in 1977 supported this principle.

22. The ABA supports legislation which would mandate the court's charging grand jurors orally on impanelling as to their duties and responsibilities; written copies of the charge would then be distributed to the grand jurors for their continuing reference. Detailing to grand jurors their powers, responsibilities and rights will help to insure their comprehensive understanding of their proper role, and will thereby help to strengthen the independence and fair function of the grand jury. Several proposed grand jury reform bills contain such provisions, as does pending legislation in several states. The Department of Justice in 1977 indicated its support for this principle.

23. In adopting principle #23, the ABA goes on record recognizing potential abuses of newspersons who are called as witnesses before the grand jury and then claim a First Amendment privilege not to testify. In some prosecutors' offices around the country, office policy already exists forbidding the calling of journalists before the grand jury. As the U.S. Supreme Court has noted, "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification . . . We do not expect courts will forget that grand juries must operate within the limits of the First Amendment, as well as the Fifth." [*Branzburg v. Hayes*, 408 U.S. 665, at 707-708 (1972).] Supporting the need for legislation in this area, a Newspaper Guild spokesperson declared in testimony before the House Judiciary Subcommittee hearings in June 1977, "The issuance of subpoenas to news gatherers has become a veritable contagion . . ."

Principle #23 is further intended to express ABA concern about the increasing number of instances nationally in which criminal defense lawyers are themselves being subpoenaed to testify before grand juries. Abuse of grand jury subpoenas used against persons having recognized confidential relationships appears to be increasing; this can drive a wedge of distrust between defense attorney and client, and has a chilling effect on Sixth Amendment rights and confidential relationships. The ABA purposely did not go into further detail in this proposed principle, believing that an expression of Association concern about present abuses of the grand jury vis-a-vis the press and the criminal defense bar would call attention to what appears to be a growing problem. The Justice Department in 1977 expressed its support for this principle. [*See also, commentary to principle #29 below.*]

24. In August 1975, the ABA House of Delegates opposed amendment of the Recalcitrant Witness Statute [28 U.S.C. 1826 (a)] to reduce from 18 to 6 months the maximum period of confinement on a civil contempt order for refusal to testify before a grand jury. The Criminal Justice Section, in its study of grand jury legislation after the 1975 action, became convinced that this position should be reconsidered, and supported a six-month maximum, as contained in several pending grand jury reform bills. The Section felt that this length of confinement would be sufficient to compel a witness to testify. In June 1977, the U.S. Department of Justice — softening its original opposition to any change in current law — agreed to support a maximum 12-month confinement. During the ABA House of Delegates debate in August 1977, the Section agreed to support the 12-month maximum as a compromise. While recognizing that abuses have occurred [*See* Record of 1976 hearings before House Judiciary Subcommittee on Immigration, Citizenship and International Law], the Section believes the ABA-approved 12-month maximum will help to avoid long, punitive confinement. It should be stressed that the Association has previously gone on record supporting legislation to prohibit multiple confinement upon a subsequent refusal by a witness to testify about the same transaction.

25. Rather than specifying proposed sanctions for violation of each proposed grand jury legislative principle outlined herein, the ABA simply notes that the court should exercise its power to impose appropriate sanctions when the proposed principles are violated. Such sanctions will obviously be fashioned in any proposed legislation; but it is not the ABA's intent to suggest statutory language.

26. Principle #26 was adopted by the ABA House of Delegates in August 1980. It provides that the prosecutor not call a witness who has stated personally or through his counsel that he will take the Fifth Amendment. Two exceptions to this are recognized, however. First, the prosecutor may of course then seek a grant of immunity under appropriate laws in his jurisdiction. Second, the prosecutor may wish to contest the witness' right to assert his privilege against self-incrimination. In that event, the prosecutor should file under seal any motion to compel the witness' testimony; the witness can file under seal any motion relating to or seeking to protect his right to refuse to give testimony. Importantly, the ABA believes proceedings stemming from these motions should be conducted *in camera*, and not be subject to public view. There will be instances, however, in which the witness may want a public hearing. In such cases, that request should be granted.

The principle builds in part upon the approved *ABA Standards for Criminal Justice on the Prosecution Function*, §3-3.6, which reads as follows:

> (e) The prosecutor should not compel the appearance of a witness before the grand jury whose activities are the subject of the inquiry if the witness states in advance that if called he or she will exercise the constitutional privilege not to testify, unless the prosecutor intends to seek a grant of immunity according to the law.

In the updating of the standards approved in February 1979, this remained unchanged from the original 1971 standard. Ordinarily, the ABA believes it would impinge upon the privilege against self-incrimination to require a potential defendant to appear before a grand jury and claim there the privilege against self-incrimination when the prosecutor has been told in advance that the witness intends to do so. This can seriously prejudice the witness in the eyes of the grand jury, and use of the tactic by the prosecution is unfair.

The principle is intended to meet one of the abuses of the grand jury. Prosecutors can, for example, leak to the press in public official investigations who is testifying and has taken the Fifth. This can ruin reputations, and — where there is no later indictment — the person has no way to clear his name. If the prosecutor is advised that the witness plans to take the Fifth, however, there is no need to parade the person before waiting television cameras for a three-minute appearance before the grand jury. Under the principle, the prosecutor can contest the witness' plan to take the Fifth, but it will be done *in camera* — and not operate for the benefit of the news media.

In amendments to the U.S. Attorneys' Manual adopted by the U.S. Department of Justice in December 1977, the Department has directed that, "If a written communication from a target signed by him and his attorney states that they will assert the Fifth Amendment, the witness should generally be excused from testifying unless there are reasons which strongly compel his personal assertion of that right before the grand jury." [Amendment — Section 9-11.253.] This principle is basically consistent with that Department internal policy. The Department agrees that there should not be a simple hard-and-fast rule that any witness who makes that assertion be excused from testifying. As the commentary to its policy states, "...such a broad rule would be improper and too convenient for witnesses to avoid testifying truthfully to their knowledge of relevant facts...However, if a 'target' of the investigation and his attorney state in a writing signed by both that the 'target' will refuse to testify on Fifth Amendment grounds, the witness ordinarily should be excused from testifying unless the grand jury and the U.S. Attorney agree to insist on the appearance. In determining the desirability of insisting on the appearance of such a person, consideration should be given to the factors which justified the subpoena in the first place, i.e., the importance of the testimony or other information sought, its unavailability from other sources, and the applicability of the Fifth Amendment privilege to the likely areas of inquiry."

Colorado has employed this procedure for three years, and, according to Denver District Attorney Dale Tooley, it is working better than the old system, where the witness had to be marched in before the grand jury.

In sum, the ABA's principle #26 effectively states the underlying principle that ordinarily a person who states that he plans to invoke the constitutional privilege against self-incrimination should not be called as a witness, for it can be extremely prejudicial before the grand jurors. On the other hand, the ABA principle also recognizes that in some instances the prosecutor will feel it necessary to try to compel that person's testimony, and proposes how this should be handled.

27. Principle #27 was adopted by the ABA House of Delegates in August 1980. It provides that the grand jury be informed as to the elements of the crimes considered by it. It addresses the problem which arises as to jurors' understanding of complex cases. The ABA believes it essential that grand jurors be given an adequate understanding of such complicated areas of the law as mail fraud and conspiracy. This is obviously most important in complex white collar cases. The grand jurors cannot intelligently consider technical cases without knowing what to look for from the witnesses coming before them.

It is not the ABA's intention, however, that failure to inform the grand jury of the elements of the crime later serve as a basis for attack on the indictment.

An essential element of fairness in the grand jury room requires some instruction to grand jurors — who are laypersons with no background in the law — as to the elements of crimes they are looking into. The ABA recognized that the mechanics of this instruction will have to be worked out in each jurisdiction as best suits its own procedures. In some jurisdictions, this would be handled by the prosecutor; in other jurisdictions, probably by the courts; in still others, manuals might be developed.

Some case law already supports such a principle. In *Gaither v. U.S.*, 413 F.2d 1061 (D.C. Cir. 1969), the D.C. Circuit dismissed an indictment because the grand jury did not have the actual terms of the indictment before it when it considered the government's evidence. This court held that Rule 6 of the Federal Rules of Criminal Procedure requires the grand jury as a body to pass on the actual terms of the indictment because "[w]ithout an indictment before them, the jurors might not have focused upon each particular element and determined which particular facts should be included in the ultimate accusation." [*Id.* at 1071.] This requirement has put little extra burden on the prosecutor in the District of Columbia and in fact sometimes helps to catch errors.

28. Principle #28 was adopted by the ABA House of Delegates in August 1980. It addresses the question of recalcitrant witnesses, a subject already covered in part by one of the previously approved principles. The new principle states that no witness shall be found in contempt for refusing to testify unless the witness is provided an opportunity to explain to the grand jurors why he refuses to testify; and the grand jury thereafter recommends to the court that the witness be found in contempt.

The ABA has previously recognized the problems which recalcitrant witnesses face, and the potential for abuses to occur. ABA principle #24, adopted in 1977, states that no witness who refuses to testify and is found in contempt should be confined for more than one year, and the ABA had before that time gone on record in opposition to reiterative contempt, with repeated confinement for refusal to testify about the same transaction.

The rationale for this additional principle is rooted in the concern that some persons who refuse to testify and are cited for contempt by the court may have a good and valid reason for not wanting to testify — a reason which the grand jurors will accept — but not a legally valid reason on which the court could base a decision not to find contempt.

While the Seventh Circuit has considered duress to be a defense to a contempt charge [*U.S. v. Patrick*, 542 F.2d 381 (7th Cir. 1976)], the Fifth Circuit recently rejected a grand jury witness' attempt to assert a duress defense to a contempt citation [*In re Grand Jury Proceedings (U.S. v. Gravel)* 605 F.2d 750 (5th Cir. 1979)], but refused to reach the question of whether duress can ever be invoked in such cases.

This proposal will help to strengthen the grand jury as an independent decision-making body. A key purpose of the principle is to give more independence to the grand jury and not just be a tool of the prosecutor. The grand jurors may well feel that a witness who has been called to testify against a relative has a valid reason not to do so. The grand jury should have input as to compelling testimony, particularly where family members are involved. In some instances, the grand jurors may perceive a genuine fear of assassination by a witness. In most cases the prosecutor will have sufficient influence with the grand jury to convince them of what he wants to do in such cases, but on occasion there will be witnesses who can persuade the grand jurors otherwise — if allowed the opportunity to express their reasons for not wanting to testify with them. The prosecutor will also, of course, be able to tell the grand jurors how critical a particular witness' testimony is to the case, allowing the jury to weigh that fact in its decision. This principle could be an additional step toward insuring due process in handling witnesses before the grand jury, and toward safeguarding and strengthening the independence of the grand jury.

29. Principle #29, generally prohibiting calling of lawyers before the grand jury to be questioned on matters learned during the legitimate investigation and preparation of a case, or being subpoenaed to produce work product material concerning the client's case, was amended and approved by the ABA House of Delegates in February 1981 with a floor amendment to delete the language, ''absent extraordinary and compelling circumstances.''

The original grand jury principles adopted by the ABA in 1977 recognized this problem in general terms. This principle addresses the issue more specifically. Principle #23 approved by the House of Delegates in 1977 provided that, ''All stages of the grand jury proceedings should be conducted with proper consideration for the preservation of press freedom, attorney-client relationships and comparable values.'' The commentary to the principle noted that its aim was ''to express ABA concern about the increasing number of instances nationally in which criminal defense lawyers are themselves being subpoenaed to testify before grand juries. Abuse of grand jury subpoenas used against persons having recognized confidential relationships appears to be increasing; this can drive a wedge of distrust between defense attorney and client, and has a chilling effect on Sixth Amendment rights and confidential relationships.''

While the Criminal Justice Section has neither the resources nor the capability to conduct a careful empirical study to measure the extent to which the calling of lawyers before grand juries is a problem nationwide, it is the Section's perception that this *is* a growing problem. The Section thus felt it critical that the ABA go on record in opposition to grand juries' routinely calling lawyers to testify about work product material.

An examination of the jurisprudence concerning application of the work product doctrine to proceedings before grand juries reveals some lack of clarity in current case law, and can serve as a backdrop to consideration of this principle. The U.S. Supreme Court in 1945 in *Hickman v. Taylor*, 329 U.S. 495, created a qualified protection from discovery for information of litigation, and for memoranda, briefs, communications and other writings prepared by counsel for his own use in handling his client's case. Equally protected were writings reflecting the attorney's mental impressions, conclusions, opinions, or legal theories — material encompassed by the term ''work product.'' The work product doctrine is distinct from and broader than the attorney-client privilege.

*Hickman* was a civil case. It was not until 1975 that the U.S. Supreme Court held the work product doctrine applicable to criminal cases. [*U.S. v. Nobles*, 422 U.S. 225 (1975)]. In *Nobles*, the Court stated:

> Although the work product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt and innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case. At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. . . It is. . . necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself. . . *Nobles*, at 238 and 239.

The Court thus recognized the clear necessity of applying the doctrine to criminal cases, and found that the protection afforded also extended to information gathered by the attorney's agents at his direction. The Court found, too, that the privilege derived from the work product doctrine was a qualified one which could be waived.

The U.S. Supreme Court has not to date specifically confronted the issue of whether the work product doctrine is applicable to grand jury proceedings. Other courts, however, have confronted and resolved the problems of applying the doctrine in that context. In *In the Matter of Terkeltoub*, 265 F.Supp. 683 (S.D.N.Y. 1966), that court refused to compel disclosure of an attorney's conversations among himself, a client, and a potential witness. It noted that the demand that a lawyer be forced to testify about his work in defense of a client ''must have at least a slightly chilling impact upon counsel for defendants in criminal cases.'' Although the *Terkeltoub* court did not make use of the term ''work product,'' that doctrine was implied in its decision, as was the tenet that the work product doctrine effectively prevents the government from acquiring through the grand jury material which it could not secure through regular criminal discovery channels.

The Eighth Circuit was the first federal court of appeals specifically to hold that the work product doctrine applies to grand jury proceedings. In *Duffy v. U.S.*, 473 F.2d 840 (1973), the court held that work product materials enjoy an absolute protection from disclosure in the grand jury context — where notes and memoranda relative to witness interviews were involved. Several recent federal cases consider whether the work product doctrine affords an absolute or qualified protection to an attorney's notes and memoranda on witness interviews, and what constitutes a showing of good cause sufficient to override the privilege, if it is qualified. In *In Re Grand Jury Subpoena Dated December 19, 1979 General Counsel (John Doe Corp.) v. U.S.*, 599 F.2d 504 (2d Cir. 1979), the Second Circuit held that an attorney's interview notes and memoranda were afforded only qualified protection. The Third Circuit reached a similar decision in

*In Re Grand Jury Investigation, Appeal of U.S.*, 599 F.2d 1224 (3d Cir. 1979). That court found that interview memoranda were protected from disclosure only in the absence of a showing of good cause by the government. The court also found that "indisputably, the work product doctrine extends to material prepared or collected before litigation actually commences."

In a case in the Southern District of New York [*In Re Grand Jury Subpoena Dated November 9, 1979*, 25 Cr.L 2529 (2/21/80)], the court ordered a law firm to turn over for possible grand jury use the tape recorded conversations between a lawyer and four persons under grand jury investigation. The court found that — while the tapes were part of the lawyer's work product — the qualified work product privilege had to give way to the government's substantial need for the evidence. The court noted that tape recordings are entitled to less protection than a lawyer's notes, since they are less likely to reflect his thought processes.

Another issue has also arisen: Whether the work product doctrine protects information acquired or materials prepared in anticipation of litigation *other* than the criminal charges which may stem from the grand jury proceeding itself. The Fourth Circuit has held, in a 1973 decision, that in the area of civil litigation, upon termination of the litigation, the work product documents prepared incident thereto retain qualified immunity from discovery, and are not freely accessible in subsequent unrelated litigation. [*Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480 (4th Cir. 1973), *cert. den.* 420 U.S. 997 (1975).] The Colorado Supreme Court has held that work product materials prepared in anticipation of specific civil litigation which is sought by the grand jury are not protected by the work product doctrine unless the civil case's subject matter and the grand jury proceedings are closely related. [*A. et al. v. District Court of the Second Judicial District*, 550 P.2d 315 (Colo. 1976) *cert. den.* 429 U.S. 1040.]

Whether materials prepared for use in administrative proceedings are protected from discovery by the grand jury as work product was considered by the Seventh Circuit in *Velsicol Chemical Corp. v. Parsons*, 561 F.2d 671 (1977), *cert. den.* 435 U.S. 942. The court refused to extend protections to documents prepared in the prior administrative proceedings. This approach significantly limits the utility of the work product doctrine in grand jury proceedings. Courts have also said the materials prepared in anticipation of prior criminal litigation do not enjoy protection from grand jury discovery. [*In Re Grand Jury Proceedings*, 73 F.R.D. 647 (M.D. Fla. 1977).] One court has refused to apply the work product doctrine to grand jury proceedings. In *In the Matter of Giovinazzo*, 382 N.Y.S. 2d 243 (N.Y. Sup. Ct. 1976), the court found that an attorney's right to exclusive possession of his work product was not such a weighty and legitimate interest as to require placing the witness' statement beyond the grand jury's reach.

In summary, a host of difficult issues arise when courts address the question of a claim of work product privilege. The boundaries of that protection are not yet clearly defined. A court must determine if the materials the grand jury seeks fall within the definition of work product, and if the materials were prepared in anticipation of litigation (including civil trials and administrative proceedings), or whether the work product doctrine prevents disclosure to the grand jury only of materials prepared in anticipation of criminal litigation which may result from the grand jury investigation itself. Whether the work product protection extends to interview notes and memoranda must also be addressed.

The ABA believes that a work product protection for attorneys in matters arising in the investigation, preparation or representation of a client's cause is of utmost importance. With the current conflicts in the case law, it is critical that the need to protect confidential relationships is strongly asserted. The present abuse of grand jury subpoenas can and does have a chilling effect on Sixth Amendment rights.

30. Principle #30 proposed by the Criminal Justice Section was approved by the ABA House of Delegates in February 1981. It was proposed as a response to a growing problem which the Section perceived. Practice among prosecutors' offices throughout the country varies greatly. Using the federal system as a benchmark, there are U.S. Attorney's offices that submit voting forms to the grand jury which solicit only a vote of "bill" or "no bill" on an indictment — regardless of the indictment's complexity. Thus, in a 50-count mail fraud case involving 10 individual defendants and one corporate defendant, a grand jury would in some (and it is believed many) federal jurisdictions simply be asked to vote for or against a proposed indictment.

Principle #30 is designed to make uniform the practice of those jurisdictions which in multi-count and/or multi-defendant cases submit voting forms to the grand jury requiring the grand jurors to address the evidence against each defendant in each count independently. Thus, in the case involving a 50-count mail fraud indictment with 10 individual and one corporate defendants, a grand jury would be required to review the sufficiency of each count as to each named defendant on an appropriate voting form provided by the prosecutor.

The necessary result would be to force the grand jury to assess the sufficiency of each count and the liability of each potential defendant separately.

**Supplement: Proposed Amendment to Rule 6(e) F.R.Cr.P.** — The policy of maintaining the secrecy of grand jury proceedings is well established [*Dennis v. United States*, 384 U.S. 855 (1966)] and any disclosures of grand jury material must be made in accordance with the provisions of Rule 6 of the Federal Rules of Criminal Procedure [*Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959)]. [*See appendix for text of Rule*] The rule requires judicial approval for disclosure of grand jury material except where disclosure is made to an attorney for the government or to a person assisting an attorney for the government in enforcing federal criminal law. Rule 6(e) F.R.Cr.P.

An "attorney for the government" within the meaning of Rule 6 is defined by Rule 54(c) Federal Rules of Criminal Procedure and includes both Justice Department attorneys and Assistant United States Attorneys. See Rule 6(e) F.R.Cr.P. 18 U.S. Code Rules 1-9 [Supp. 1979 at p. 26]. This definition of "attorney for the government" is incorporated in the 1977 amendment to Rule 6(e) and was designed to facilitate grand jury investigations by providing, under controlled circumstances, greater access to grand jury material for persons assisting "government attorneys" in enforcing federal criminal law. [*Id.*]

The disclosure restrictions limiting access to persons assisting in the enforcement of criminal law is consistent with the time honored general principle that the grand jury is not to be used as a device for enforcing civil law [*United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958)], and ensures against a flow of grand jury information to various government agencies for civil enforcement purposes. Moreover, the requirement of 6(e) that a list be provided to the court of those persons to whom disclosure has been made serves both as a cautionary reminder to prosecutors that secrecy is to be preserved, and as a means of checking on 6(e) compliance.

In February 1977, the ABA House of Delegates — in considering the then-pending proposed amendments to (6)e — adopted as policy the following recommendation to the Congress:

> That an explicit legislative statement be made that the *only* purpose of the amendment is to provide the government with the expertise of other governmental personnel, where needed; and that each governmental department or administrative agency has the obligation to insure that the grand jury information disseminated to its experts is not used in violation of any constitutional rights, in unrelated criminal cases, or in any civil proceedings.

At the time this policy was before the Criminal Justice Section, several Council members expressed strong concern that disclosure to a broad group of government personnel might be used as a subterfuge by some agencies to obtain information through the grand jury process which was not legitimately required for the purposes of the pending grand jury investigation. The Section thus urged that this be clarified via a legislative statement.

The difficulty with the restrictions as presently enacted in Rule 6(e) is that they leave unresolved the question of whether an "attorney for the government" who has purely civil responsibilities may use grand jury material without court approval. [*Capitol Indemnity Corp. v. First Minnesota Construction Co.*, et al. 405 F. Supp. 929, 932 (D. Mass. 1975). *See also In Re Grand Jury Proceedings*, 445 F. Supp. 349 (D.C.R.I. 1978).] Attorneys in the Antitrust Division, e.g., may be examining allegations of misconduct before a grand jury, while their colleagues may elsewhere be examining similar or even related misconduct involving targets of the grand jury probe — but with a view toward purely civil relief. As the court in *Capitol Indemnity* pointed out in denying "civil" access to an Assistant United States Attorney:

> "[b]y permitting a "civil" Assistant U.S. Attorney carte blanche to share the fruits of his "criminal" counterpart's grand jury inquiry, the twin dangers exist that the grand jury could be used improperly as a vehicle for civil discovery and the secrecy of the grand jury's deliberations could be compromised." [*Supra* at 932.]

When information from the grand jury is provided to such civil lawyers, there appears to be a clear breach of jury secrecy, yet Rule 6(e) does not on its face appear to prohibit such action. Moreover, no inventory of the individuals given such access will be compiled by the government or filed with the court.

The proposed amendment to Rule 6(e) would make explicit the clear intention of the drafters of the 1977 amendment to the rule, i.e., to increase access to grand jury material in order to make effective criminal investigations more viable, while at the same time ensuring that the grand jury is not used, *by anyone*, as an uncontrolled means of enforcing civil laws.

The potential for abuse of the grand jury process in such instances is real. Again using the analogy of the Antitrust Division, it is possible that grand jury information obtained in an investigation of price-fixing in one jurisdiction could be made available to Antitrust Division lawyers examining price-fixing allegations by the same parties in another jurisdiction where only civil remedies are contemplated. The possibility of abuse seems even greater where a grand jury investigation has ended without indictment — but related civil action involving the same parties subsequently arises. That grand jury materials compiled by "government attorneys" in the earlier criminal inquiry might now be used by "government attorneys in the performance of [their] duty" with regard to civil law is not a remote prospect.

Since the purpose of limiting access to grand jury material to persons enforcing federal criminal law was to prevent the use of such materials in civil proceedings until a court could balance the government's need for disclosure against the rule's policy of secrecy, the present loophole in Rule 6(e) should be closed. Access to grand jury material should be given, absent court order, only to government personnel enforcing federal criminal law.

The ABA believes the court has inherent power, in its discretion, to dismiss an indictment when this rule has been violated. When matters occurring before the grand jury are improperly disclosed to individuals other than "attorneys for the government," for example, the appropriate remedy has been found to be by way of dismissal [*United States v. Braniff Airways, Inc.*], or, where no indictment has been voted, by way of termination of the grand jury inquiry. [*In Re Grand Jury Subpoenas* (General Motors Corp.); 428 F. Supp. 579 (W.D. Tex. 1977); 573 F.2d 936 *rev'd on rehearing en banc on other grounds*, 584 F.2d 1366 (5th Cir. 1978).]